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Am. B. 3040 (121g)

REPORTS

FROM

THE COURT OF CLAIMS,

SUBMITTED TO THE

HOUSE OF REPRESENTATIVES

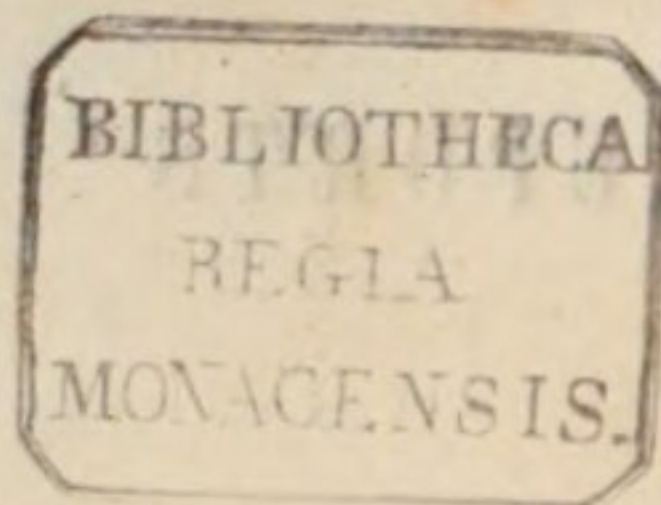
DURING

THE SECOND SESSION OF THE THIRTY-FIFTH CONGRESS,

1858-'59.

ONE VOLUME.

WASHINGTON:
JAMES B. STEEDMAN, PRINTER.
1859.



THE COURT OF CLAIMS

HOUSE OF REPRESENTATIVES

THE SECOND SESSION OF THE THIRTY-THIRD CONGRESS

1854-55

ONE VOLUME

WASHINGTON:

JOHN D. LEITCH, PRINTER

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TO THE

REPORTS FROM THE COURT OF CLAIMS,

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THOMAS ALLEN.

[To accompany Bill H. R. C. C. No. 87.]

DECEMBER 7, 1858.

JANUARY 21, 1859.—Ordered to be printed.

The COURT OF CLAIMS submit the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

THOMAS ALLEN *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Statement of claimant's account.
3. Deposition of W. Hickey, offered by the claimant, and transmitted to House of Representatives.
4. Claimant's brief.
5. United States Solicitor's brief.
6. Opinion of the Court.
7. Bill allowing claimant twenty-seven thousand seven hundred and thirty dollars and three cents.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the
[L. S.] seal of said Court, at Washington, this seventh day of December, A. D. 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims:

The petition of Thomas Allen, of St. Louis, in the State of Missouri, respectfully represents: That the United States is indebted to your petitioner in the just and full sum of twenty-seven thousand seven hundred and thirty dollars and two and two-thirds cents, (\$27,730 02 $\frac{2}{3}$,) with interest from March 3, 1843, for work and labor

done and performed, and for materials furnished at the special instance and request of the said United States, a particular account whereof is herewith filed, marked Exhibit A. And proceeding to set forth a full statement of the claim, and of the action of Congress and the executive government thereon, your petitioner states :

That the said claim is for the value of twenty thousand copies of the Compendium of the Sixth Census of the United States, amounting, in the whole, to \$43,579 66 $\frac{2}{3}$, on which has been credited the sum of \$15,849 64, under the circumstances hereinafter set forth.

That the said work was authorized by an act of Congress, passed and approved the first day of September, in the year 1841, (5 Stat. at Large, 452,) whereby it was, among other things, enacted that "*the Secretary of State be, and he is hereby, authorized to cause to be printed twenty thousand copies of the Compendium or Abridgement of the Sixth Census, by counties and principal towns, together with the tables of apportionment, as prepared at the Department of State, for the use of Congress.*"

That, in pursuance of the said authority of law, the Secretary of State (then the Hon. Daniel Webster) employed and directed your petitioner, then the printer to the Senate of the United States, to execute the said work; that the copy necessary for the same was officially delivered to your petitioner; and that the said work was faithfully executed and performed by your petitioner, and was received and accepted by the government of the United States and appropriated to the public use. And particularly he refers your honors to the joint resolutions of Congress of September 1, 1841, (5 Stat., 467,) and April 15, 1842, (5 Stat., 583,) in his behalf.

Your petitioner further states that the prices charged by him for said work, as per said account Exhibit A, are fair and reasonable, according to the standard prices of public printing at that time, and were such as he was then actually receiving for similar work under then existing laws in such case made and provided.

That in the month of September, 1841, Messrs. Blair & Rives addressed a memorial to Congress on the subject of the printing of the said compendium, the right to which, or some part thereof, they claimed, which said petition was referred to a select committee of the House of Representatives, for the proceedings whereof your petitioner refers to the Journals of the House, and which resulted in a report made August 19, 1842, accompanied by a bill, recommending that your petitioner be paid \$17,849 64, and the said Blair & Rives \$8,924 83.—(*Report No. 1009, and bill No. 584, H. R., 27th Congress, 2d Session.*)

That in the month of July, 1842, the said work was completed by your petitioner, and on the 6th of August following he rendered his account therefor, amounting to \$43,579 66 $\frac{2}{3}$, and which was by the Secretary of State transmitted to Congress and an appropriation to pay the same requested. That subsequently, on the 17th of February, 1843, the Secretary of State transmitted to the chairman of the Committee of Ways and Means of the House of Representatives the estimate for an appropriation to pay the same.

That pending the appropriation bill for civil and diplomatic

expenses of the government for the year 1844, a difference in opinion touching the said appropriation arose between the Senate and the House, the latter having appropriated only \$15,849 64 for the same, and the former (the Senate) having amended the bill by substituting the whole sum claimed by your petitioner, viz: \$43,579 66 $\frac{2}{3}$, which said difference, and the adherence of the House to its original position, resulted in a committee of conference, and in the final passage of the bill as originally passed by the House for \$15,849 64, with the following proviso: "*Provided, That nothing herein contained shall prejudice any future application to Congress for further compensation for said works.*"—(Act March 3, 1843, 5 Stat., 631.)

Under this act, and with the saving of the proviso aforesaid, your petitioner received the said sum of \$15,849 64, which is credited in his said account.

That subsequently, (December 13, 1843,) the Secretary of State (Mr. Upshur) submitted to the Committee of Ways and Means the statement of the balance remaining due to your petitioner, \$27,730 03, and asked an appropriation for its payment. That subsequently, at the same session, your petitioner presented his first memorial to Congress, and an additional memorial, argumentative in its nature, and reviewing the report No. 1009 aforesaid. The matter was referred to the Committee of Claims of the House of Representatives. From that time down to the session of 1853-'54 the claim of your petitioner has been from time to time renewed without any definite action by Congress.

Your petitioner further states, that no other person or persons are owners of the said claim or interested therein.

All which matters and things your petitioner is prepared to maintain and prove, when and where your honorable Court shall direct.

Wherefore he prays judgment that the United States are indebted to him in the before mentioned sum of \$27,730 02 $\frac{2}{3}$, with interest from March 3, 1843; and that a decree may be passed for a bill to be reported to Congress to the effect of the exhibit herewith filed, marked B; and that he may have such other and further relief, &c.

And your petitioner will ever pray, &c.,

THOMAS ALLEN.

BADGER & CARLISLE,
Of counsel for petitioner.

DISTRICT OF COLUMBIA, *County of Washington, ss.*

Be it remembered that on this fifth day of July, 1855, before me, the subscriber, a justice of the peace in and for the county aforesaid, personally appeared Thomas Allen, the petitioner in the foregoing petition to the Court of Claims against the United States, and made oath on the Holy Evangely of Almighty God that the facts stated in the said petition are true, to the best of his knowledge and belief.

Sworn and subscribed before me,

[L. S.]

B. K. MORSELL, *J. P.*

WASHINGTON, July 18, 1842.

The United States of America to Thomas Allen, Dr.

To composition of 370 tables, 10,640 ems each, equal to 1,300 octavo pages, brevier rule and figure, at \$3 50 per page	\$4,550 00
To 10 pages plain work, 10,640 ems each, equal to 36 pages octavo, at \$1 75 per page.....	63 00
To presswork and paper of 20,000 copies of 1,336 octavo pages, 167 signatures of eight pages, at \$233 33 $\frac{1}{3}$ per signature	38,966 66 $\frac{2}{3}$
Total.....	43,579 66 $\frac{2}{3}$

Contra, Cr., March 3, 1843.

By amount of appropriation made and accepted, with express reservation as to balance, as per act of Congress (5 Stat. at Large, p. 631).....	15,849 64
Balance due March 3, 1843.....	27,730 02 $\frac{2}{3}$

Deposition of William Hickey in the claim of Thomas Allen vs. The United States.

Question 1. Please to state your name, occupation, age, place of residence for the past year, whether you have any interest, direct or indirect, in the claim of Thomas Allen vs. The United States, and whether and in what degree you are related to the claimant.

Answer. Named William Hickey; my occupation is that of clerk in the office of the Secretary of the Senate; my age fifty-six; my residence for the past year has been in the District of Columbia, and has been for many years. I have no interest whatever in the claim above mentioned. I am not related in any manner to the claimant, Thomas Allen.

Question 2. Please to state how long you have held the office of clerk in the office above stated.

Answer. Since the session of 1824 or 1825.

Question 3. Were you at any time, and during what period, charged with the duty of examining the printing accounts of the Senate?

Answer. I was charged with that duty about the session of 1826 or 1827, and continued in the general superintendence of it till about the year 1843, during a portion of which time I had a clerk under me.

Question 4. What was the rate or standard of prices of printing for Congress in the years of 1841 and 1842?

Answer. The rates were fixed by the joint resolution of Congress of

the 3d of March, 1819, and so continued until changed by the act of Congress of the 3d of March, 1845.

Question 5. Please to look at the account now shown to you, and state whether, at any time heretofore, and when, you examined the same; and whether you have again examined the same now; and whether the account is correctly stated according to the standard referred to in your last answer.

Answer. I have examined an account, of which the account now exhibited to me appears to be a correct copy, the items of charge in which agrees precisely with the printed copy of the said account contained in page 4 of the printed reports of committees of the House of Representatives, No. 2, of the second session of the 28th Congress, and amounting to the sum of forty-three thousand five hundred and seventy-nine dollars and sixty-six and two-thirds cents, (\$43,579 66 $\frac{2}{3}$), and which is the account referred to by me in my letter to Matthew St. Clair Clarke, Clerk of the House of Representatives, of the 3d day of August, 1842, and contained in the same page of said document above referred to. I also on yesterday re-examined the said account with the document charged therein, viz: The Compendium of the Sixth Census, and again found the said account to agree with the prices established by the said joint resolution of the 3d of March, 1819, and in the amount of work to be correctly stated.

Question 6. Do you know any other matter or thing relative to the claim in question?

Answer. I know of no other matter or thing, of my own knowledge, relative to the claim in question.

Cross-examined by the Solicitor.

Question 1. When you speak of the amount of work being charged correctly, do you mean anything more than to say that the items stated in the account are correctly carried out? or do you mean to say that the account presents the true amount of work done and delivered.

Answer. I meant to say that I had examined one copy of the said Compendium of the Sixth Census, and had found that the quantity of printing matter contained in the said book was correctly charged in the said account according to the prices established by the joint resolution of the 3d of March, 1819, and that the said account embraced a charge for twenty thousand (20,000) copies of the said book; but as to the delivery of the said twenty thousand copies to the government I have no knowledge.

W. HICKEY.

WASHINGTON, *July* 18, 1842.

The UNITED STATES,

To THOMAS ALLEN, Dr.

To composition of 370 tables, 10,640 ems each, equal	
to 1,300 octavo pages brevier rule and figure, at	
\$3 50 per page	\$4,550 00

To 10 pages plain work, 10,640 ems each, equal to 36 pages octavo, at \$1 75 per page	\$63 00
To presswork and paper of 20,000 copies of 1,336 octavo pages, 167 signatures of 8 pages, at \$233 33 $\frac{1}{3}$ per signature.....	38,966 66 $\frac{2}{3}$
	43,579 66 $\frac{2}{3}$

Contra Cr.

March, 1843.—By this amount paid on account.....	\$15,849 64
Balance	27,730 02 $\frac{2}{3}$
	43,579 66 $\frac{2}{3}$

with interest.

N. B.—The above account was exhibited to the witness, William Hickey, on his examination.

W. A. MAURY, *Comm'r.*

DISTRICT OF COLUMBIA, }
 Washington county, } ss.

On the fifteenth day of March, 1856, personally came W. Hickey, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of W. Hickey, taken at the request of Thomas Allen, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Thomas Allen.

The adverse party was notified, did attend, and did not object.

W. A. MAURY, *Comm'r.*

Commissioner's fees, \$6 20.

UNITED STATES COURT OF CLAIMS.

THOMAS ALLEN, CLAIMANT.

Brief for the Claimant.

It will be contended:

I. That under the act of Congress of September 1, 1841, (5 Statutes, 452,) the Secretary of State had authority to employ the claimant to print the twenty thousand copies of the Compendium of the Sixth

Census, and to furnish and deliver the same to the United States at the rates and prices then established by law for public printing.

II. That even if this were not so, yet that by the joint resolution of April 15, 1842, (5 Stat., 583,) the said contract was ratified and approved, and the said 20,000 copies were accepted and ordered to be distributed to the use of the United States.

III. That in point of fact the amount claimed by the petitioner is correctly calculated and charged, and that the said amount is due to him, with interest from March 3, 1843.

GEO. E. BADGER,
J. M. CARLISLE,
For claimant.

IN THE COURT OF CLAIMS.

ON THE PETITION OF THOMAS ALLEN.

Brief of the United States Solicitor.

This is a claim for printing the Compendium of the Sixth Census, under the direction of the State Department, under the resolution of September, 1841.

The petitioner claims compensation under the resolution at the rate allowed by Congress to the congressional printers.

I. My first objection is that the contract with Allen was not obligatory, because not made as required by law.—(See 5 Stat., p. 339.) There was no advertisement, and the job was not let to the lowest bidder, as that law requires all departmental printing to be done. It was only as a job of the State Department that Allen could be employed, because if it had been Congress ordered such work, the printer of Congress was the person to be employed. Blair & Rives, as printers to Congress, claimed the job in right of their office, but this claim was deemed untenable. It was then a job of the State Department for the public use, and as such the Secretary could only contract as directed by the law of 1839.

II. If, however, the contract be lawful, there is no proof that it was worth more to perform it than has been paid. The rate paid by Congress for congressional work is certainly not the standard of compensation for jobs done for the departments, or for private individuals. The pay for congressional work is notoriously higher than is paid for other work, because much of it is done at unseasonable hours and under great press.

That Mr. Webster transmitted Allen's account to Congress cannot be construed into an endorsement as approval of the account; that he did not contract to pay such prices to Allen is admitted. He merely ordered the work to be done by him, and did not fix the price, and he sends in the bill afterwards without comment.

I refer to Mr. Garret Davis' report 1009, House of Representatives, 2d session, 29th Congress.

M. BLAIR, *Solicitor.*

THOMAS ALLEN *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The claimant claims that a balance of \$27,730 03 is due him for printing, in 1842, 20,000 copies of the Compendium of the Sixth Census of the United States, and furnishing the materials. He also claims interest on that sum from March 3, 1843.

The facts are believed to be as follows :

On the first of September, 1841, Congress passed an act which provided as follows : "That the Secretary of State be and he is hereby authorized to cause to be printed twenty thousand copies of the compendium or abridgement of the 6th census by counties and principal towns, together with the tables of apportionment, as prepared at the Department of State, for the use of Congress."—(5 Stat. at Large, 452.)

In order to comply with that law the Secretary of State, Mr. Webster, gave the following order to Mr. Weaver, the superintending clerk of the 6th census :

"SEPTEMBER 21, 1841.

"CAPT. WEAVER: The compendium ordered by Congress to be printed under the direction of this department will be printed by Mr. Allen. You will please make arrangements accordingly.

DANIEL WEBSTER."

Mr. Weaver, accordingly, furnished Mr. Allen with the necessary copy for the printing of the compendium ; and 20,000 copies of the work were printed by Mr. Allen in conformity with Mr. Webster's order.

Afterwards those copies were delivered by Mr. Allen according to the order of the State Department ; and Congress, on the 15th of April, 1842, directed them to be distributed and disposed of by the following joint resolution :

"*Resolved, &c.*, That the statistics, including the census of pensioners, and the compendium or abridgement of the 6th census of the United States, heretofore required by law to be printed under the direction of the Secretary of State, shall be distributed and disposed of by the Secretary in the manner and in the proportions specified in the joint resolution of Congress passed the first day of September, one thousand eight hundred and forty-one : *Provided always*, That seventeen thousand copies of the said compendium or abridgement shall be distributed among the States, Territories, and persons entitled to distribution under the said resolution, and in the proportions therein specified ; and that the remaining copies of the said statistics and compendium be placed in the Library of Congress for future distribution."—(5 Statutes at Large, 583.)

Mr. Webster afterwards made the following communication to the House of Representatives :

“ DEPARTMENT OF STATE, *Washington, August 6, 1842.*

“ The undersigned, Secretary of State, has the honor to transmit to Congress the enclosed communication from Mr. Thomas Allen, requesting payment for printing the compendium of the 6th census, together with his account therefor, and certificates of the Clerk of the House of Representatives and of two practical printers annexed thereto.

“ The printing was ordered by the act of the 1st of September, 1841, entitled ‘An act to amend the act entitled an act to provide for taking the 6th census or enumeration of the inhabitants of the United States,’ and no appropriation has been made to defray the cost.

“ DANIEL WEBSTER.

“ The SPEAKER OF THE HOUSE OF REPRESENTATIVES.”

The account and certificates referred to in the Secretary’s letter are as follows :

“ WASHINGTON, *July 18, 1842.*

“ *State Department, United States,*

“ To THOMAS ALLEN, Dr.

“ To composition of 370 tables, 10,640 ems each, equal to 1,300 octavo pages brevier rule and figure, at \$3 50 per page.....	\$4,550 00
“ To 10 pages plain work, 10,640 ems each, equal to 36 pages octavo, at \$1 75 per page.....	63 00
“ To presswork and paper of 20,000 copies of 1,336 octavo pages, 167 signatures of 8 pages at \$233 33½ per signature.....	38,966 66⅔
	43,579 66⅔

“ WASHINGTON, *July 22, 1842.*

“ The undersigned have examined a bill of Mr. Thomas Allen for printing 20,000 copies of 380 pages of the ‘compendium of the 6th census,’ amounting to \$43,579 66⅔. In our opinion, the price charged is fair and reasonable, and the calculation correct.

“ GEO. M. GROUARD,
“ JAS. F. HALIDAY.”

“ OFFICE SECRETARY OF THE SENATE,

“ *August 3, 1842.*

“ DEAR SIR: Having understood from Mr. Goodrich, clerk to Thos. Allen, printer of the Senate, &c., that you desired that an examination should be made by me as to the accuracy of the account of Thomas

Allen, for 'printing the compendium of the enumeration of the inhabitants and statistics of the United States,' I have made such examination, and believe the quantity of printing or composition, as stated, and the calculations for composition, and presswork and paper, correct, according to the standard of prices established by the joint resolution of Congress of March 3, 1819.

"I am, very respectfully, your obedient servant,

"W. HICKEY.

"MATTHEW ST. CLAIR CLARKE, Esq.,

"*Clerk of the House of Representatives, U. S.*"

"AUGUST 4, 1842.

"SIR: In the absence of my examining and pay clerk, I have caused the accompanying account to be examined, as above stated, by Mr. Hickey, the examining clerk in the office of the Secretary of the Senate, whose mode of examination corresponds with the rule in my office, and in whose accuracy I have entire confidence, and am satisfied, therefore, that the account is correct, according to the mode of settling accounts for printing done for the House of Representatives of the United States, amounting to \$43,579 66 $\frac{2}{3}$.

"M. ST. CLAIR CLARKE,

"*Clerk of the House of Representatives, U. S.*

"THE SECRETARY OF STATE."

The following is another communication from the Secretary of State, Mr. Webster:

"DEPARTMENT OF STATE,

"Washington, February 17, 1843.

"SIR: The account of Mr. Thomas Allen, for printing the compendium of the sixth census, transmitted by me to the two Houses of Congress on the 6th day of August, 1842, appears to be as yet unpaid, no appropriation for it having been made. The service was rendered by direction of this department, under the express authority of the act approved on the 1st of September, 1841, entitled 'An act to amend the act entitled "An act to provide for taking the sixth census, or enumeration of the inhabitants of the United States, approved March 3, 1839," and the acts amending the same.' The work has been delivered, and, to the extent authorized by Congress, has been distributed. No reason is therefore known why an appropriation to pay for it should not be made.

"I take the liberty to submit to the Committee of Ways and Means an estimate for that object, in the sum of \$43,579 67, as specified in the annexed copy of the account of Mr. Allen.

"I have the honor to be your obedient servant,

"DANIEL WEBSTER.

"Hon. MILLARD FILLMORE,

"*Chairman of the Committee of Ways and Means, H. R.*"

On the 3d of March, 1843, Congress made an appropriation as follows:

“For the payment of all claims which Thomas Allen has against the United States for printing twenty thousand copies of ‘the compendium or abridgment of the sixth census, by counties and principal towns, together with the tables of apportionment, as prepared at the State Department, for the use of Congress,’ the sum of fifteen thousand eight hundred and forty-nine dollars and sixty-four cents ; and for the payment of all claims which Blair & Rives have against the United States for printing ten thousand copies of the same document, eight thousand nine hundred and twenty-four dollars and eighty-two cents : *Provided*, That nothing herein contained shall prejudice any future application to Congress for further compensation for said works.” (5 Stat. at Large, 631.)

We have the deposition of Mr. William Hickey, clerk in the office of the Secretary of the Senate of the United States, in regard to the price of the printing and materials aforesaid. He is the person whose certificate on the subject accompanied Mr. Webster’s said communication of August 6, 1841, and is before copied. In this deposition, taken in 1856, the deponent says that he was charged with the duty of examining the printing accounts of the Senate about the session of 1826 or 1827, and continued in the general superintendence of it till about 1843 ; that the rates of printing for Congress were fixed by joint resolution of the 3d of March, 1819, and so continued until changed by the act of Congress of the 3d of March, 1845 ; that he had examined an account, of which the one then exhibited to him appeared to be a correct copy, the items of charge in which agree precisely with the printed copy of the account in page 4 of the printed reports of committees of the House of Representatives, No. 2, of the 2d session of the 28th Congress, and amounting to the sum of \$43,579 66 $\frac{2}{3}$, and which is the account referred to by him in his letter (before copied) to Matthew St. Clair Clarke, Clerk of the House of Representatives, of the 3d day of August, 1842, and contained on the same page of said document above referred to ; that he had also, the day before, re-examined the said account, with the document charged therein, viz., the compendium of the sixth census, and again found the said account to agree with the prices established by the said joint resolution of the 3d of March, 1819, and in the amount of work to be correctly stated ; that he meant to say that he had examined one copy of the said compendium of the sixth census, and had found that the quantity of printing matter contained in the said book was correctly charged in the said account according to the prices established by the joint resolution of the 3d of March, 1819 ; and that the said account embraced a charge of 20,000 copies of the said book ; but that as to the delivery of the said 20,000 copies to the government, he had no knowledge.

There are, relative to this case, two statements in the form of depositions—one purporting to be signed by James F. Haliday and the other by Z. W. Denman—but they are not sworn to, and are not, of course, admissible as evidence.

There is, among the papers in this cause, a printed copy of the testimony of said Mr. Weaver, taken before a committee of the House of Representatives, in which he makes the following statement :

“On or about the 1st of June, 1841, I mentioned, for the first time,

to the Secretary of State, that I had been preparing an abstract or compendium of the aggregates of the sixth census, and that I had shown it to several members of Congress, and that an anxiety had been expressed by them for its publication. I suggested that although I had devised the plan originally as a private work, yet if Congress wished it, or he thought it might be printed for the use of Congress under the 11th section of the act of March 3, 1839, that I would be glad to do so. I stated that it would be merely printing the aggregates of the marshals in a condensed and portable form ; that the two great works, the statistics and enumeration, were too large and inconvenient for general use, and, in fact, only fit for libraries. The Secretary of State did not seem to understand the matter at the time, and it was dropped by me. Two or three days after my first broaching the subject, I was surprised by Mr. Webster entering my room, and saying that he wished to be further informed in relation to that abstract or compendium of the census. I then further explained to him the plan, and referred to the law which I thought gave him the power to print. After examining the subject, and seeming to be well satisfied with the value of the new arrangement, he said to me, 'You can do as you please about it.' This was all the authority I had, and I certainly supposed it ample then, as is evident from my letter at the time to Blair & Rives, put upon the record book."

Subsequently to the time when said conversation is said by Mr. Weaver to have taken place, Mr. Webster made the following communication :

" DEPARTMENT OF STATE,
" *Washington, January 6, 1842.*

" SIR: I have the honor to acknowledge the receipt of your note of the 4th instant, transmitting the petition of Messrs. Blair & Rives, which was referred to the Committee on the Apportionment of Representatives, and requesting my views of the case.

" In reply I have the honor to state that previous to the first of September last, there was no authority for printing any compendium of the sixth census, and that, consequently, I could not have given, and in fact did not give, any order, direction, or instruction on the subject.

" The act of September provided that the Secretary of State be authorized to cause to be printed twenty thousand copies of the compendium or abridgment of the sixth census, by counties and principal towns, together with the tables of apportionment as prepared at the Department of State for the use of Congress. In compliance with the duty thus imposed I gave an order for the printing, and that it should be executed by Thomas Allen ; and for the binding, directed by the second section of the same act, that it should be executed by Mr. R. P. Anderson.

" The petition of Messrs. Blair & Rives is herewith returned.

" I have the honor to be, sir, your obedient servant,

" DANIEL WEBSTER.

" Hon. H. EVERETT,

" *House of Representatives.*"

On the 26th of February, 1842, a memorial relative to said printing was referred to a committee, with instructions "that, until the committee can report, Blair & Rives and Thomas Allen be instructed to desist from all further work in the printing of the tables of the sixth census; and that the committee have power to send for persons and papers."—(House Journal, 27 Cong., 2d sess., p. 447.) And on the 14th April, 1842, a joint resolution was passed by Congress prohibiting the payment of any money for the printing of the compendium until their further order.—(5 Stat. at Large, p. 583.)

We have thus stated the material facts connected with this case. Our opinion is that, until the said act of the 1st of September, 1841, Mr. Webster had no authority to contract with any person for the printing of said compendium; and that he did not make or order to be made any such contract before that time. We are further of opinion that that act of the 1st of September, 1841, gave him full authority to make the contract he did make with Mr. Allen for the printing of said work. It is objected to this contract with Mr. Allen, that it was not made as required by a provision in the civil and diplomatic act of 1839. That provision is as follows:

"For compiling and printing the Biennial Register, one thousand eight hundred dollars: *Provided*, That the printing of the said Biennial Register, and the job printing, stationery, and binding of each of the executive departments, shall be furnished by contract, proposals for which shall be regularly advertised for in the public prints, the classes, character, and description of the printing being specified in each advertisement as far as that can be done; and it being made a condition in all cases, unless otherwise specifically stated in the advertisement, that the work shall be done in the city of Washington. And the contract shall in each case, so far as the proposals and acceptance shall enable the contract to be made, be given to the lowest bidder whose bid shall be accompanied with the proper testimonials of the ability of the bidder to fulfill his contract."—(5 Stat. at Large, 339.)

We do not think this statute applies to the present case. The printing of the compendium was not a job printing of an executive department. It was printing specially authorized by an act of Congress, not for the use of an executive department, but for the use of Congress.

We are also of opinion that the work was completed by Mr. Allen to the satisfaction of the proper officer of the government, and that it was not only delivered to and accepted by such officer, but that it was distributed or otherwise disposed of conformably to a joint resolution of Congress, passed for the purpose of disposing of it.

As to the instructions of the House of Representatives of the 26th February, 1842, before referred to, it is sufficient to observe that they could not affect a contract made under the authority of an act of Congress; and as to the joint resolution aforesaid of the 14th of April, 1842, it is only necessary to say that after its passage the said act of 1843 was passed, appropriating a certain sum as payment for the work, with a proviso that nothing in the act should prejudice any future application to Congress for further compensation.

There is one other question in this cause, and that is as to the price charged for the items of the account. By an act of Congress it was made Mr. Webster's duty to have the compendium printed, and of course to see that the charges for the work were correct. We have his approval of the account in his communication to the Committee of Ways and Means of the 17th of February, 1843, to which reference has been already made. We have also the papers which accompanied his communication of the 6th of August, 1842, to the House of Representatives, in support of the account. There is also the deposition of Mr. Hickey, taken in this cause, which is of itself sufficient to establish the correctness of the charges.

The sum of \$27,730 03, which the petitioner claims as the amount of principal now due, is the balance of his account proved by Mr. Hickey's deposition, after deducting the sum appropriated by the act of the 3d of March, 1843, above referred to.

We consider the claimant entitled to said sum of \$27,730 03, and we report a bill in his favor for that sum. No interest is allowed.

THOMAS C. NYE.

DECEMBER 7, 1858.—Reported from the Court of Claims and committed to a Committee of the Whole House to-morrow.

The COURT OF CLAIMS submitted the following

R E P O R T .

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

THOMAS C. NYE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Contracts between the Post Office Department and claimant.
3. Depositions taken by the claimant and offered as evidence, transmitted to the House of Representatives.
4. Depositions taken by the United States and offered as evidence, transmitted to the House of Representatives.
5. Letters and circular from the Post Office Department, referred to in the opinion of the Court, transmitted to the House of Representatives.
6. Claimant's brief.
7. United States Solicitor's brief.
8. Opinion of the Court, adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed
[L. S.] the seal of said Court, at Washington, this seventh day of
December, A. D., 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Honorable the Court of Claims:

The petition of Thomas C. Nye, a citizen of the State of New York, respectfully sheweth: That he entered into the service of the United States in the transportation of the mails prior to the year 1837, and that in the spring of that year your petitioner, in company with others,

entered into contracts with the Post Office Department to transport the daily mails from the city of Utica, in the State of New York, to the village of Ithaca in said State, and also from Utica aforesaid to Binghamton, and also from the village of De Ruyter to Cherry Valley, in the said State; and was also largely interested in the mail contract of J. M. Sherwood, from the city of Albany to the village of Salina in said State, and stocked said road with teams and post coaches.

Your petitioner further shows that the above routes were relet in 1841, and that he was interested in all of them by the renewal of his contracts with the United States government, and that he was the sole contractor from Canastota to Hamilton, also the sole contractor from De Ruyter to Cherry Valley, which last contract was extended to Cooperstown, daily, from Cherry Valley in said State. And that your petitioner continued interested in said mail contracts upon the aforesaid post roads, as above stated, up to 1842 or 1843, when the contract of said Sherwood, from Albany to Salina aforesaid, was transferred to your petitioner, who became thereby, with the assent and approval of the Post Office Department, together with Hiram Lewis, a contractor with said department for carrying said mails from Albany to Cherry Valley, and from Cherry Valley to Syracuse, and all the afore mentioned routes; and that your petitioner, under said contracts, found it necessary to invest a large amount of capital in horses and post coaches, &c., and from the year 1841 up to 1845 your petitioner owned and employed in such service constantly about two hundred horses and a large number of post coaches, and from the year 1841 to 1845 was running over two hundred miles of daily mails upon the aforesaid post roads.

And your petitioner further shows that by the terms and regulations of the Post Office Department then in force, viz: by act of Congress passed March 3, 1825, sec. 4, 5th vol. United States Statutes at Large, p. 103, and by the regulations of the department, a copy of which is hereunto annexed, marked exhibit "A," your petitioner felt secure in making such large investments in horses, coaches, &c., in the government service, because, under the laws and regulations of the Post Office Department above referred to, and particularly the 13th note to the proposals for carrying the United States mail from July 1, 1841, to June 30, 1845, inclusive, and dated December 22, 1840, which reads as follows:

13. On coach routes where the present contractor shall be superseded by an under bidder who may not have the stage property requisite for the performance of the contract, he shall purchase from the present contractor such of his coaches, teams, and harness belonging to the route as shall be needed, and may be suitable for the service, at a fair valuation; and make payment therefor by reasonable instalments, as his pay becomes due, unless the present contractor shall continue to run stages on the route. Should they not agree as to the suitability of the property, the terms of the security, each may choose a person, who may appoint a third, and their decision shall be final; or the Postmaster General will name the umpire. Should the under bidder fail to comply, his bid will be offered to the contractor;

but should he decline it, the proposals of the under bidder will be accepted unconditionally. The under bidder should give early notice of his intention to take or not to take the stock, and if the latter, of his reasons; and the present contractor is to determine, on the first application, whether he will sell it or not.

He felt justified in placing a good stock on the lines, as, if said regulations had been complied with, he could by no possibility have lost anything.

That your petitioner, in good faith, entered into the mail service of the United States under the law governing the Post Office Department and the regulations thereof, as above stated and referred to, and made the aforesaid large investments of capital in stocking said post roads, and to the amount of at least of *fifty thousand dollars*.

And your petitioner further shows that by the 18th section of the act of Congress approved March 3, 1845, a copy of which is hereunto annexed, marked exhibit "B," it was enacted that no new mail contractor shall hereafter be required to purchase out, or take at a valuation, the stock or vehicles of any previous contractor for the same route.—(5th volume U. S. Statutes at Large, p. 738.)

And your petitioner further shows that in the letting of the mail contracts in the year 1845, on the respective routes and lines hereinbefore specified, and on which your petitioner was a contractor as aforesaid, previous and up to said letting, in the year 1845, your petitioner was an unsuccessful bidder upon all of said post routes, and lost all his contracts for transporting the mails upon said roads or routes.

And by the terms of the lettings of the new contractors upon said post roads the new contractors were not required to purchase out or take at a valuation the stock and vehicles with which your petitioner had supplied and run the said post roads, and your petitioner was left with all of said stock and vehicles for running the said roads upon his hands, without any use or employment for the same, and unavoidably sustained thereby a large amount of damage in disposing of the same.

And your petitioner further shows that he is advised and believes that as he entered into the aforesaid mail contracts under the laws and regulations of the Post Office Department, governing the contract between your petitioner and the said Post Office Department, which required the new contractors to purchase and take at a valuation his aforesaid stock upon the aforesaid post roads, that it was a direct and positive violation of the contracts between your petitioner and the Post Office Department to let the aforesaid mail contracts to new contractors, without requiring them to purchase or take at a valuation the stock with which your petitioner had supplied said post roads, and with which he had been running the same.

Your petitioner further shows that the aforesaid act of March 3, 1845, did not take effect till the first day of July thereafter, and the aforesaid mail contracts for the year 1845 were advertised to be let, with the usual provision requiring the new contractors to purchase or take at a valuation the stock of previous contractors upon the same roads, and that the new contracts on the post roads or routes on which

your petitioner had, previous to said letting for the year 1845, had contracts with the Post Office Department for transporting the mails, were let before the act of March 3, 1845, took effect, and without containing any provision requiring the new contractor to purchase or take at a valuation the stock of your petitioner upon the aforesaid post roads.

Your petitioner therefore insists that he has a just and legal claim upon the United States government for the amount of damages to which he has been subjected by reason of the aforesaid violation of his contract with the Post Office Department.

And whereas, by rule No. 2, the Court requires that the contract shall be printed in the words of the contract, but the contracts in this case being very numerous, to print them would be very expensive, the petitioner herewith files said contracts, marked exhibit C, D, E, F, G, H, I, J, and others on file in the Post Office Department, and prays that they may be taken as parts of this petition.

And your petitioner further states that he has not received any indemnity or satisfaction of his damages aforesaid from any department of the government, and that he has not transferred any portion of his said claim to any other person, but that he is the owner thereof.

Your petitioner would further show that his claim was presented to the Senate of the United States at the first session of the thirty-third Congress, and that it was referred to the Committee on the Post Office and Post Roads, which committee reported a bill for the relief of your petitioner, which passed the Senate and was sent to the House of Representatives, when, at the same session, it was referred to the Committee on Post Offices and Post Roads, on the 14th of July, 1854; and on the 20th of the same month and year said committee reported the Senate bill (being No. 307) without amendment, which, on its second reading, was referred to the Committee of the Whole House, and no further action was had thereon.

D. IRA BAKER, *of Counsel.*

Before me personally appeared Thomas C. Nye, the petitioner named in the above petition, who, being duly sworn, deposes and says that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

Exhibits referred to in above petition and on file in this Court :

A, copy of proposals and regulations of the Post Office Department, under which these contracts were let.

B, copy of part section 18 of the act of Congress passed March 3, 1845.

C, copy of contract with United States.

D, copy of contract with United States.

E, copy of contract with United States.

F, copy of contract with United States.

G, copy of contract with United States.

H, copy of contract with United States.

I, copy of contract with United States.

J, copy of contract with United States.

No. 995.—\$1,511 PER ANNUM.

This indenture of contract, made the twenty-first day of April, in the year one thousand eight hundred and forty-one, between Thomas C. Nye, contractor for carrying the mails of the United States, of one part, and the United States of America, of the other part, *witnesseth*: That the parties have mutually covenanted as follows, viz: The said contractor covenants with the said United States, in consideration of the covenant of the United States hereinafter expressed, to carry the mail of the United States from Cherry Valley, New York, by Middlefield Centre, Cooperstown, Oaksville, Burlington, West Burlington, Edmeston, South Edmeston, Columbus, Sherburne, Smyrna, and Otselic, to De Ruyter, numbered as route 995, New York, in manner following, to wit: three times a week, and back, in two-horse coaches, for and during the term commencing the first day of July, in the year one thousand eight hundred and forty-one, and ending with the thirtieth day of June, in the year one thousand eight hundred and forty-five; the said contractor hereby agreeing and stipulating under this covenant, 1st, to carry said mail within the times fixed in the annexed schedule of departures and arrivals, except that when more than seven minutes are taken for opening and closing the mails at any office, the surplus time so taken is to be allowed in addition to what is given by the schedule, and so carry until said schedule is altered by the authority of the Postmaster General of the United States, as hereinafter provided, and then to carry according to said altered schedule; 2d, to carry said mail in a safe and secure manner, free from wet or other injury, in a boot under the driver's seat, and in preference to passengers, and to their entire excusion if its weight and bulk require it; 3d, to take the mail and every part of it from, and deliver it and every part of it at, each post office on the route, or that may be hereafter established on the route, and into the post office at each end of the route, and into the post office at the place at which the carrier stops at night, if one is there kept; and if no office is there kept, to lock it up in some secure place at the contractor's risk.

The contractor also covenants with the United States, in and for the consideration above mentioned, to be answerable for the person to whom he shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through his unfaithfulness or want of care; and that he will discharge any carrier of said mail whenever required to do so by the Postmaster General; also that he will not transmit, by himself or his agent, or be concerned in transmitting, commercial intelligence more rapidly than by mail, and that he will not carry out of the mail letters or newspapers which should go by post; and further to convey without additional charge post office blanks, mail bags, and the special agents of the department on the exhibition of their credentials; and give a preference to passengers brought in the connecting mail lines over those travelling in any other.

The said contractor further covenants, in and for the consideration above mentioned, to collect quarterly, if required by the Postmaster General, of postmasters on said route, the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General, in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in his hands.

The said United States covenant with the said contractor to pay him for his services aforesaid, at the rate of one thousand five hundred and eleven dollars a year, to wit, quarterly, in the months of May, August, November, and February, through the postmasters on the route or otherwise, at the option of the Postmaster General of the United States; said pay to be subject, however, to be reduced or discontinued by the Postmaster General as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby mutually stipulated and agreed by the said parties that the Postmaster General may alter the contract, and alter the schedule, he allowing a pro rata increase of compensation within the restrictions imposed by law for the additional service required or for the increased speed, if the employment of additional stock or carriers is rendered necessary; but the contractor may, in case of increased expedition, relinquish the contract, on timely notice, if he prefers it to the change; also, that the Postmaster General may discontinue or curtail the service, he allowing one month's extra pay on the amount dispensed with.

And it is also hereby mutually stipulated and agreed by the said parties that in all cases there is to be a forfeiture of the pay of the trip when the trip is not run; a forfeiture of at least one-fourth part of it when the running or arrival is so far behind time as to lose the connexion with a depending mail; and a forfeiture of a due proportion of it when a grade of service is rendered inferior to two-horse coach service, and that these forfeitures may be increased into penalties of higher amount, according to the nature or frequency of the failure and the importance of the mail; also that fines may be imposed upon the contractor, unless the delinquency be satisfactorily explained to the Postmaster General in due time, for failing to take from, or deliver at, a post office the mail or any part of it; for suffering it to be wet, injured, lost, or destroyed; for carrying in a place or manner that exposes it to depredation, loss or injury, by being wet or otherwise; for refusing after demand to convey a mail by any coach which the contractor regularly runs or is concerned in running, on the route beyond the number of trips above specified; or for not arriving at the time set in the schedule. And for setting up or running an express to transmit commercial intelligence in advance of the mail a penalty may be exacted of the contractor equal to a quarter's pay; but in all other cases no fine shall exceed three times the price of the trip.

And it is hereby further mutually stipulated and agreed by the said parties that the Postmaster General may annul the contract for repeated failures; for violating the post office laws; for disobeying the instructions of the department; for refusing to discharge a carrier

when required by the department; for assigning the contract without the consent of the Postmaster General; for setting up or running an express as aforesaid; or whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and this contract shall in all its parts be subject to the terms and requisitions of an act of Congress passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

In witness whereof, the said contractor and the Postmaster General have hereunto set their hands and seals, the day and year set opposite their names, respectively.

APRIL 12, 1842.

C. A. WICKLIFFE, [L. s.]

\$250. August 10, 1841. Contractor having accepted offer of two hundred and fifty dollars per year for additional tri-weekly mail from Cherry Valley to Cooperstown, ordered, that two hundred and fifty dollars additional per year be allowed him.

September 21, 1841. Postmaster certifies that contractor complied with above order on 27th July, 1841.

The schedule of Departures and Arrivals.

Leave Cherry Valley daily, except Sunday, at 8 p. m.

Arrive at Cooperstown same days, by 10.30 p. m., and at De Ruyter Tuesday, Thursday, and Saturday, by 7 p. m.

Leave De Ruyter Monday, Wednesday, and Friday, at 12 m.

Arrive at Cooperstown next days by 4.30 a. m., and at Cherry Valley daily, except Monday, by 7 a. m.

No. 631.—\$3,500 PER ANNUM.

This indenture of contract, made the thirty-first day of May, in the year one thousand eight hundred and thirty-seven, between Thomas C. Nye, of Madison, Madison county, New York, contractor for carrying the mails of the United States, of one part, and the United States of America of the other part, *witnesseth*, that the said parties have mutually covenanted as follows, viz: The said contractor covenants with the said United States—

1. To carry the mail of the United States from Cherry Valley, by Middlefield Centre, Cooperstown, Oakville, Burlington, West Burlington, Edmeston, Columbus, Columbus Corners, Sherburne, Smyrna, and Otselic, to De Ruyter and back, three times a week, in four-horse post coaches, at the rate of eight hundred and seventy-five dollars for every quarter of a year during the continuance of this contract; to be paid by postmasters on the route above mentioned, or otherwise, at the option of the Postmaster General of the United States, *in the months of May, August, November, and February.*

2. That the mail shall be duly delivered at and taken from each

post office now established, or that may be established, on the route embraced in this contract; that it shall be conveyed on this route in the time specified in the annexed schedule, and in a secure and safe manner, free from wet or other injury, in a secure dry boot or box under the driver's seat, if the mail is carried by stage or coach, or under a sufficient oil cloth or bear skin when carried on horseback or sulky, as hereinbefore designated or hereafter directed by the Postmaster General; that it shall be duly delivered into the post office at the end of the route and into the post office at the place at which the carrier stops at night, if one is there kept, and if no office is there kept it shall be locked up in some secure place, at the contractor's risk.

3. That if the contractor shall run a stage, or other vehicle, more rapidly or more frequently than he is required by the contract to carry the mail, he shall give the same increased celerity and frequency to the mail, and without increase of compensation.

4. That the contractor, if on a stage or coach route, shall, in the conveyance of passengers, give a preference to those who are brought in the connecting mail lines over those travelling in any other, so that connecting mail stage routes shall form continuous travelling lines.

5. That he shall not, by himself or his agent, transmit, or be concerned in transmitting, commercial intelligence more rapidly than by mail.

6. That the contractor will, if required by the Postmaster General, collect quarterly of postmasters on said route the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in his hands.

7. That in every case of failure to perform the trip, whatever may be the cause, there may be a forfeiture of the pay for the trip; and a failure to arrive at a post office so long after the time set in the schedule as to lose the connexion with a depending mail shall be considered as equal to a whole trip lost; which forfeiture may be increased into a penalty not exceeding one hundred dollars, according to the circumstances under which the failure occurred.

8. That the contractor shall be subject, for failure to take or deliver a mail or any part of a mail, for suffering the mail to be wet or otherwise injured, or lost, or destroyed, to a penalty of five dollars, which may be increased to one hundred dollars, according to the size and importance of the mail and the circumstances under which the failure occurred.

9. That a fine not less than the tenth part and not exceeding the half of the price of a trip may be imposed for each ten minutes' delay of the mail to arrive at the time specified in the schedule.

10. That the contractor shall be answerable for the persons to whom he shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through their unfaithfulness or want of care, and that he will discharge any driver or carrier of said mail whenever required to do so by the Postmaster General.

11. That the schedules being arranged so as to allow seven minutes to each post office for opening and closing the mails generally, and one hour to the distributing post offices, the Postmaster General is to have, nevertheless, the power of extending the time, on allowing the like extension to the contractor, if he shall claim it.

12. That the Postmaster General may alter the schedule, and alter the route, he allowing a *pro rata* increase of compensation for any additional service required and for any increased speed, when the employment of additional stock or carriers is rendered necessary.

13. That the Postmaster General may curtail the service or dispense with it entirely, he allowing one month's extra pay on the amount deducted in case he wishes to place on the route a higher degree of service than is contracted for, first offering the privilege to the contractor on the route of performing such higher service on the terms that can be obtained; or whenever he shall deem it expedient to lessen the service, or to leave such route, or any part of it, out of operation, or to carry the mail by steamboat or railroad cars; provided, that reduction of compensation, in consequence of reduction of service, shall not exceed the exact proportion which the service dispensed with bears to the whole service.

14. That the Postmaster General may annul the contract for repeated failures of the contractor to perform any of the stipulations of the contract; for violating the post office law or disobeying the instructions of the department; or for assigning his contract without the consent of the Postmaster General first obtained.

15. The said United States covenant with the said contractor to pay as aforesaid, at the rate afore mentioned, quarterly, in the months of *May, August, November, and February.*

Provided always, That this contract shall be null and void in case the contractor or any person that may become interested in this contract, directly or indirectly, shall become a postmaster or an assistant postmaster. No member of Congress shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon; and this contract shall, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

And it is mutually covenanted and agreed by the said parties that this contract shall commence on the first day of July, 1837, and continue in force until the 30th day of June, in the year 1841.

In witness whereof, the said contractor and the Postmaster General have hereunto set their hands and seals the day and year set opposite their names, respectively.

DECEMBER 28, 1837.

AMOS KENDALL, [L. S.]

Schedule.

This schedule subject to alteration by the Postmaster General, agreeably to the provision contained in the twelfth section of the contract.

Leave Cherry Valley Monday, Wednesday, and Friday, at 8 a. m., and in winter at 5 p. m. preceding day.

Arrive at De Ruyter next days by 12 m.

Leave De Ruyter Tuesday, Thursday, and Saturday, at 12 m.

Arrive at Cherry Valley next days by 2 a. m., and in winter by 8 a. m.

No. 1019.—\$500 PER ANNUM.

This indenture of contract, made the twenty-second day of April, in the year one thousand eight hundred and forty-one, between Thomas C. Nye, contractor for carrying the mails of the United States, of the one part, and the United States of America, of the other part, *witnesseth*: That the parties have mutually covenanted as follows, viz: The said contractor covenants with the said United States, in consideration of the covenant of the United States hereinafter expressed, to carry the mail of the United States from Canastota, New York, by Lenox, Clockville, Peterboro', Morrisville, and Eaton, to Hamilton, numbered as route —, in manner following: six times a week and back, in two-horse coaches, for and during the term commencing the first day of July, in the year one thousand eight and forty-one, and ending with the 30th day of June, in the year one thousand eight hundred and forty-five; the said contractor hereby agreeing and stipulating under this covenant: 1st, to carry said mail within the times fixed in the annexed schedule of departures and arrivals, except that when more than seven minutes are taken for opening and closing the mails at any office, the surplus time so taken is to be allowed in addition to what is given by the schedule, and so carry until said schedule is altered by the authority of the Postmaster General of the United States as hereinafter provided, and then to carry according to said altered schedule. 2d, to carry said mail in a safe and secure manner, free from wet or other injury, in a boot under the driver's seat, and in preference to passengers, and to their entire exclusion, if its weight and bulk require it. 3d, to take the mail and every part of it from, and deliver it and every part of it at, each post office on the route, or that may be hereafter established on the route, and into the post office at each end of the route, and into the post office at the place at which the carrier stops at night, if one is there kept; and if no office is there kept, to lock it up in some secure place, at the contractor's risk.

The contractor also covenants with the United States, in and for the consideration above mentioned, to be answerable for the person to whom he shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through his unfaithfulness or want of care; and that he will discharge any carrier of said mail whenever required to do so by the Postmaster General; also that he will not transmit, by himself or his agent, or be concerned

in transmitting, commercial intelligence more rapidly than by mail, and that he will not carry out of the mail letters or newspapers which should go by post; and further, to convey, without additional charge, post office blanks, mail bags, and the special agents of the department on the exhibition of their credentials; and give a preference to passengers brought in the connecting mail lines over those travelling in any other.

The said contractor further covenants, in and for the consideration above mentioned, to collect quarterly, if required by the Postmaster General, of postmasters on said route, the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General, in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in his hands.

The said United States covenant with the said contractor to pay him for his services aforesaid, at the rate of five hundred dollars a year, to wit: quarterly, in the months of May, August, November, and February, through the postmasters on the route or otherwise, at the option of the Postmaster General of the United States—said pay to be subject, however, to be reduced or discontinued by the Postmaster General as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby mutually stipulated and agreed by the said parties that the Postmaster General may alter the contract, and alter the schedule, he allowing a pro rata increase of compensation, within the restrictions imposed by law, for the additional service required, or for the increased speed, if the employment of additional stock or carriers is rendered necessary; but the contractor may, in case of increased expedition, relinquish the contract, on timely notice, if he prefers it to the change; also, that the Postmaster General may discontinue or curtail the service, he allowing one month's extra pay on the amount dispensed with.

And it is also hereby mutually stipulated and agreed by the said parties that in all cases there is to be a forfeiture of the pay of the trip when the trip is not run; a forfeiture of at least one-fourth part of it when the running or arrival is so far behind time as to lose the connexion with a depending mail; and a forfeiture of a due proportion of it when a grade of service is rendered inferior to two-horse coach service; and that these forfeitures may be increased into penalties of higher amount, according to the nature or frequency of the failure and the importance of the mail; also that fines may be imposed upon the contractor, unless the delinquency be satisfactorily explained to the Postmaster General in due time, for failing to take from or deliver at a post office the mail or any part of it; for suffering it to be wet, injured, lost, or destroyed; for carrying in a place or manner that exposes it to depredation, loss, or injury by being wet or otherwise; for refusing after demand to convey a mail by any coach which the contractor regularly runs or is concerned in running, on the route, beyond the number of trips above specified; or for not arriving at the time set in the schedule. And for setting up or running an express

to transmit commercial intelligence in advance of the mail, a penalty may be exacted of the contractor equal to a quarter's pay; but in all other cases no fine shall exceed three times the price of the trip.

And it is hereby further mutually stipulated and agreed by the said parties that the Postmaster General may annul the contract for repeated failures; for violating the Post Office laws; for disobeying the instructions of the department; for refusing to discharge a carrier when required by the department; for assigning the contract without the consent of the Postmaster General; for setting up or running an express as aforesaid; or whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress. And this contract shall, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

In witness whereof, the said contractor and the Postmaster General have hereunto set their hands and seals, the day and year set opposite their names, respectively.

C. A. WICKLIFFE, [SEAL.]

APRIL 12, 1842.

The schedule of Departures and Arrivals.

Leave Canastota every day except Sunday, at 8 a. m.

Arrive at Hamilton same day by 1 p. m.

Leave Hamilton every day except Sunday, at 12 m.

Arrive at Canastota same day by 5 p. m.

No. 913.—\$2,700 PER ANNUM.

This indenture of contract, made the seventh day of September, in the year one thousand eight hundred and forty-two, between Thomas C. Nye and Hiram Lewis, contractors for carrying the mails of the United States, of one part, and the United States of America, of the other part, *witnesseth*: That the parties have mutually covenanted as follows, viz: The said contractors covenant with the said United States, in consideration of the covenant of the United States hereinafter expressed, to carry the mail of the United States from Albany, New York, by Guilderland, Dunnsville, Duaneburg, Esperance, Sloanesville, Carlisle, Sharon, Sharon Centre, and Leesville, to Cherry Valley, numbered as route 913, in manner following: six times a week and back in two-horse coaches, for and during the term commencing the first day of October, in the year one thousand eight hundred and forty-two, and ending with the 30th day of June, in the year one thousand eight hundred and forty five; the said contractor hereby agreeing and stipulating under this covenant: 1st, to carry said mail within the time fixed in the annexed schedule of departures and arrivals, except that when more than seven minutes are taken for opening and closing the mails at any office, the surplus time so

taken is to be allowed in addition to what is given by the schedule, and so carry until said schedule is altered by the authority of the Postmaster General of the United States, as hereinafter provided, and then to carry according to said altered schedule. 2d, to carry said mail in a safe and secure manner, free from wet or other injury, in a boot under the driver's seat, and in preference to passengers, and to their entire exclusion, if its weight and bulk require it. 3d, to take the mail and every part of it from, and deliver it and every part of it at each post office on the route, or that may be hereafter established on the route, and into the post office at each end of the route, and into to the post office at the place at which the carrier stops at night, if one is there kept; and if no office is there kept, to lock it up in some secure place, at the contractors' risk.

The contractors also covenant with the United States, in and for the consideration above mentioned, to be answerable for the person to whom they shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through his unfaithfulness or want of care; and that they will discharge any carrier of said mail whenever required to do so by the Postmaster General; also that they will not transmit, by themselves or their agent, or be concerned in transmitting, commercial intelligence more rapidly than by mail, and that they will not carry out of the mail letters or newspapers which should go by post; and further, to convey, without additional charge, post office blanks, mail bags, and the special agents of the department on the exhibition of their credentials, and give a preference to passengers brought in the connecting mail lines over those travelling in any other.

The said contractors further covenant, in and for the consideration above mentioned, to collect quarterly, if required by the Postmaster General, of postmasters on said route, the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General, in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in their hands.

The said United States covenant with the said contractors to pay them for their services aforesaid, at the rate of twenty-seven hundred dollars a year, to wit: quarterly, in the months of May, August, November, and February, through the postmasters on the route or otherwise, at the option of the Postmaster General of the United States—said pay to be subject, however, to be reduced or discontinued by the Postmaster General as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby mutually stipulated and agreed by the said parties that the Postmaster General may alter the contract, and alter the schedule, he allowing a *pro rata* increase of compensation, within the restrictions imposed by law, for the additional service required, or for the increased speed, if the employment of additional stock or carriers is rendered necessary; but the contractors may, in case of increased expedition, relinquish the contract, on timely notice, if they prefer it to the change; also, that the Postmaster General may

discontinue or curtail the service, he allowing one month's extra pay on the amount dispensed with.

And it is also hereby mutually stipulated and agreed by the said parties that in all cases there is to be a forfeiture of the pay of the trip when the trip is not run; a forfeiture of at least one-fourth part of it when the running or arrival is so far behind time as to lose the connexion with a depending mail; and a forfeiture of a due proportion of it when a grade of service is rendered inferior to two-horse coaches; and that these forfeitures may be increased into penalties of higher amount, according to the nature or frequency of the failure and the importance of the mail; also that fines may be imposed upon the contractors, unless the delinquency be satisfactorily explained to the Postmaster General in due time, for failure to take from or deliver at a post office the mail or any part of it; for suffering it to be wet, injured, lost, or destroyed; for carrying in a place or manner that exposes it to depredation, loss, or injury by being wet or otherwise; for refusing after demand to convey a mail by any coach which the contractors regularly run or are concerned in running, on the route, beyond the number of trips above specified; or for not arriving at the time set in the schedule. And for setting up or running an express to transmit commercial intelligence in advance of the mail, a penalty may be exacted of the contractors equal to a quarter's pay; but in all other cases no fine shall exceed three times the price of the trip.

And it is hereby further mutually stipulated and agreed by the said parties that the Postmaster General may annul the contract for repeated failures; for violating the Post Office laws; for disobeying the instructions of the department; for refusing to discharge a carrier when required by the department; for assigning the contract without the consent of the Postmaster General; for setting up or running an express as aforesaid; or whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress. And this contract shall, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

In witness whereof, the said contractors and the Postmaster General have hereunto set their hands and seals, the day and year set opposite their names, respectively.

MARCH 27, 1843.

C. WICKLIFFE. [L. S.]

The schedule of Arrivals and Departures.

Leave Albany every day, except Sunday, at 8 a. m.

Arrive at Cherry Valley same day by 7 p. m.

Leave Cherry Valley every day, except Sunday, at 8 a. m.

Arrive at Albany same day by 7 p. m.

No. 987.—\$4,000 PER ANNUM.

This indenture of contract, made the seventh day of September, in the year one thousand eight hundred and forty-two, between Thomas C. Nye and Hiram Lewis, contractors for carrying the mails of the United States, of one part, and the United States of America, of the other part, *witnesseth*: That the parties have mutually covenanted as follows, viz: The said contractors covenant with the said United States, in consideration of the covenant of the United States hereinafter expressed, to carry the mails of the United States from Cherry Valley, New York, by East Springfield, Springfield, Warren, Richfield Springs, Winfield, West Winfield, Bridgewater, Sangerfield, Madison, Bouchfield, Morrisville, Nelson, Cazenovia, Oran, Manlius, Fayetteville, and De Witt, to Syracuse, numbered as route 987, in manner following: six times a week and back, in two-horse coaches, for and during the term commencing the first day of October, in the year one thousand eight hundred and forty-two, and ending with the thirtieth day of June, in the year one thousand eight hundred and forty-five; the said contractors hereby agreeing and stipulating under this covenant: 1st, to carry said mail within the times fixed in the annexed schedule of departures and arrivals, except that when more than seven minutes are taken for opening and closing the mails at any office, the surplus time so taken is to be allowed in addition to what is given by the schedule, and so carry until said schedule is altered by authority of the Postmaster General of the United States as hereinafter provided, and then to carry according to said altered schedule. 2d, to carry said mail in a safe and secure manner, free from wet or other injury, in a boot under the driver's seat, and in preference to passengers, and to their entire exclusion, if its weight and bulk require it. 3d, to take the mail and every part of it from, and deliver it and every part of it at, each post office on the route, or that may be hereafter established on the route, and into the post office at each end of the route, and into the post office at the place at which the carrier stops at night, if one is there kept; and if no office is there kept, to lock it up in some secure place, at the contractors' risk.

The contractors also covenant with the United States, in and for the consideration above mentioned, to be answerable for the person to whom they shall commit the care and transportation of the mail, and accountable for any damages that may be sustained through his unfaithfulness or want of care; and that they will discharge any carrier of said mail whenever required to do so by the Postmaster General; also that they will not transmit, by themselves or their agent, or be concerned in transmitting, commercial intelligence more rapidly than by mail, and that they will not carry out of the mail letters or newspapers which should go by post; and further, to convey, without additional charge, post office blanks, mail bags, and the special agents of the department on the exhibition of their credentials; and give a

preference to passengers brought in the connecting mail lines over those travelling in any other.

The said contractors further covenant, in and for the consideration above mentioned, to collect quarterly, if required by the Postmaster General, of postmasters on said route, the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General, in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in their hands.

The said United States covenant with the said contractors to pay them for their services aforesaid, at the rate of four thousand dollars a year, to wit: quarterly, in the months of May, August, November, and February, through the postmasters on the route or otherwise, at the option of the Postmaster General of the United States—said pay to be subject, however, to be reduced or discontinued by the Postmaster General as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby mutually stipulated and agreed by the said parties that the Postmaster General may alter the contract, and alter the schedule, he allowing a pro rata increase of compensation, within the restrictions imposed by law, for the additional service required or for the increased speed, if the employment of additional stock or carriers is rendered necessary; but the contractors may, in case of increased expedition, relinquish the contract, on timely notice, if they prefer it to the change; also, that the Postmaster General may discontinue or curtail the service, he allowing one month's extra pay on the amount dispensed with.

And it is also hereby mutually stipulated and agreed by the said parties that in all cases there is to be a forfeiture of the pay of the trip when the trip is not run; a forfeiture of at least one-fourth part of it when the running or arrival is so far behind time as to lose the connexion with a depending mail; and a forfeiture of a due proportion of it when a grade of service is rendered inferior to two-horse coaches; and that these forfeitures may be increased into penalties of higher amount, according to the nature or frequency of the failure and the importance of the mail; also that fines may be imposed upon the contractors, unless the delinquency be satisfactorily explained to the Postmaster General in due time, for failing to take from or deliver at a post office the mail or any part of it; for suffering it to be wet, injured, lost, or destroyed; for carrying in a place or manner that exposes it to depredation, loss, or injury by being wet or otherwise; for refusing after demand to convey a mail by any coach which the contractors regularly run or are concerned in running, on the route, beyond the number of trips above specified; or for not arriving at the time set in the schedule. And for setting up or running an express to transmit commercial intelligence in advance of the mail, a penalty may be exacted of the contractors equal to a quarter's pay; but in all other cases no fine shall exceed three times the price of the trip.

And it is hereby further mutually stipulated and agreed by the said parties that the Postmaster General may annul the contract for

repeated failures; for violating the post office laws; for disobeying the instructions of the department; for refusing to discharge a carrier when required by the department; for assigning the contract without the consent of the Postmaster General; for setting up or running an express as aforesaid; or whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and this contract shall in all its parts be subject to the terms and requisitions of an act of Congress, passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

In witness whereof, the said contractors and the Postmaster General have hereunto set their hands and seals the day and year set opposite their names respectively.

MARCH 27, 1843.

C. A. WICKLIFFE, [L. S.]

The Schedule of Departures and Arrivals.

Leave Cherry Valley every day except Sunday, at 8 p. m.

Arrive at Syracuse next day by 3 p. m.

Leave Syracuse every day except Sunday, at 12 m.

Arrive at Cherry Valley next day by 7 a. m.

No. 624—\$3,800 PER ANNUM.

This indenture of contract, made the thirty-first day of May, in the year one thousand eight hundred and thirty-seven, between Silas D. Childs, Theodore S. Faxton, Milton D. Parker, and James V. P. Gardner, Utica, New York, of the firm of Parker & Company, Thomas C. Nye, of Madison, Madison county, New York, Ethan Clark, of Oxford, Chenango county, New York, contractors for carrying the mails of the United States, of one part, and the United States of America of the other part, witnesseth: that the said parties have mutually covenanted as follows, viz: The said contractors covenant with the United States—

1. To carry the mail of the United States from Utica by New Hartford, Paris, Waterville, Madison, Bouckville, Hamilton, Earlville, Sherburne, North Norwich, Norwich, Oxford, South Oxford, Green and Chenango Forks, to Binghamton and back daily, in four-horse post coaches, at the rate of nine hundred and fifty dollars for every quarter of a year during the continuance of this contract, to be paid by postmasters on the route above mentioned, or otherwise at the option of the Postmaster General of the United States, in the months of May, August, November, and February.

2. That the mail shall be duly delivered at and taken from each post office now established, or that may be established, on the route embraced in this contract; that it shall be conveyed on this route in the time specified in the annexed schedule, and in a secure and safe manner, free from wet or other injury, in a secure dry boot or box under the driver's seat, if the mail is carried by stage or coach; or under a sufficient oil cloth or bear skin when carried on horseback or

sulky, as hereinbefore designated, or hereafter directed by the Postmaster General; that it shall be duly delivered into the post office at the end of the route, and into the post office at the place at which the carrier stops at night, if one is there kept, and if no office is there kept, it shall be locked up in some secure place at the contractor's risk.

3. That if the contractors shall run a stage or other vehicle more rapidly or more frequently than they are required by the contract to carry the mail, they shall give the same increased celerity and frequency to the mail, and without increase of compensation.

4. That the contractors, if on a stage or coach route, shall, in the conveyance of passengers, give a preference to those who are brought in the connecting mail lines over those travelling in any other, so that connecting mail stage routes shall form continuous travelling lines.

5. That they shall not, by themselves or their agent, transmit, or be concerned in transmitting commercial intelligence more rapidly than by mail.

6. That the contractors will, if required by the Postmaster General, collect quarterly of postmasters on said route the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in their hands.

7. That in every case of failure to perform the trip, whatever may be the cause, there may be a forfeiture of the pay for the trip; and a failure to arrive at a post office so long after the time set in the schedule as to lose the connexion with a depending mail, shall be considered as equal to a whole trip lost; which forfeiture may be increased into a penalty not exceeding one hundred dollars, according to the circumstances under which the failure occurred.

8. That the contractors shall be subject for failure to take or deliver a mail or any part of a mail, for suffering the mail to be wet or otherwise injured, or lost, or destroyed, to a penalty of ten dollars, which may be increased to one hundred dollars, according to the size and importance of the mail, and the circumstances under which the failure occurred.

9. That a fine not less than the tenth part and not exceeding the half of the price of a trip may be imposed for each ten minutes' delay of the mail to arrive at the time specified in the schedule.

10. That the contractors shall be answerable for the persons to whom they shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through their unfaithfulness or want of care; and that they will discharge any driver or carrier of said mail whenever required to do so by the Postmaster General.

11. That the schedules being arranged so as to allow seven minutes to each post office for opening and closing the mails generally, and one hour to the distributing post offices, the Postmaster General is to

have, nevertheless, the power of extending the time on allowing the like extension to the contractors, if they shall claim it.

12. That the Postmaster General may alter the schedule and alter the route, he allowing a pro rata increase of compensation for any additional service required, and for any increased speed, when the employment of additional stock or carriers is rendered necessary.

13. That the Postmaster General may curtail the service or dis-pense with it entirely, he allowing one month's extra pay upon the amount deducted, in case he wishes to place on the route a higher degree of service than is contracted for, first offering the privilege to the contractors on the route of performing such higher service on the terms that can be obtained, or whenever he shall deem it expedient to lessen the service or to leave such route, or any part of it, out of operation, or to carry the mail by steamboat or railroad cars; Provided that reduction of compensation in consequence of reduction of service, shall not exceed the exact proportion which the service dispensed with bears to the whole service.

14. That the Postmaster General may annul the contract for repeated failures of the contractors to perform any of the stipulations of the contract; for violating the post office law, or disobeying the instructions of the department; or for assigning his contract without the consent of the Postmaster General first obtained.

15. The said United States covenant with the said contractors to pay as aforesaid, at the rate aforementioned, quarterly, in the months of May, August, November, and February.

Provided always, That this contract shall be null and void in case the contractors or any person that may become interested in this contract directly or indirectly, shall become a postmaster or an assistant postmaster. No member of Congress shall be admitted to any share or part of this contract or agreement, or to any benefit to arise there-upon; and this contract shall in all its parts be subject to the terms and requisitions of an act of Congress passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

And it is mutually covenanted and agreed by the said parties, that this contract shall commence on the 1st day of July, 1837, and continue in force until the 30th day of June, in the year 1841.

In witness whereof, the said contractors and the Postmaster General have hereunto set their hands and seals the day and year set opposite their names respectively.

FEBRUARY 9, 1838.

AMOS KENDALL, [SEAL.]

This schedule subject to alteration by the Postmaster General, agreeably to the provisions contained in the twelfth section of the contract.

Leave Utica every day at 5 a. m.;
Arrive at Binghamton next day by 12 m.
Leave Binghamton every day at 1 p. m.;
Arrive at Utica next day by 9 p. m.

No. 627.—\$6,416 PER ANNUM.

This indenture of contract, made the thirty-first day of May in the year one thousand eight hundred and thirty-seven, between M. D. Parker of Utica, Oneida county, New York, S. D. Childs, T. S. Faxon, J. V. P. Gardner, Thomas C. Nye, of Madison, Madison county, New York, C. L. Grant of Ithaca, Tompkins county, New York, contractors for carrying the mails of the United States, of one part, and the United States of America of the other part, witnesseth: that the said parties have mutually covenanted as follows, viz: The said contractors covenant with the United States;

1. To carry the mail of the United States from Utica by New Hartford, Clinton, Marshall, Madison, Eaton, Erieville, New Woodstock, De Ruyter, Cuyler, Truxton, Homer, Cortland Village, McLean, Dryden and Varna, to Ithaca, at the rate of one thousand six hundred and four dollars for every quarter of a year, during the continuance of this contract; to be paid by postmasters on the route abovementioned, or otherwise, at the option of the Postmaster General of the United States, in the months of May, August, November and February.

2. That the mail shall be duly delivered at and taken from each post office now established, or that may be established, on the route embraced in this contract; that it shall be conveyed on this route in the time specified in the annexed schedule; and in a secure and safe manner, free from wet or other injury, in a secure dry boot or box, under the driver's seat, if the mail is carried by stage or coach; or under a sufficient oil cloth or bear skin, when carried on horseback or sulky, as hereinbefore designated, or hereafter directed by the Postmaster General; that it shall be duly delivered into the post office at the end of the route, and into the post office at the place at which the carrier stops at night, if one is there kept, and if no office is there kept, it shall be locked up in some secure place, at the contractors' risk.

3. That if the contractors shall run a stage, or other vehicle, more rapidly or more frequently than they are required by the contract to carry the mail, they shall give the same increased celerity and frequency to the mail, and without increase of compensation.

4. That the contractors, if on a stage or coach route, shall in the conveyance of passengers, give a preference to those who are brought in the connecting mail lines over those travelling in any other, so that connecting mail stage routes shall form continuous travelling lines.

5. That he shall not, by himself, or his agent, transmit, or be concerned in transmitting commercial intelligence more rapidly than by mail.

6. That the contractor will, if required by the Postmaster General, collect quarterly of postmasters on said route, the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General, in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in his hands.

7. That in every case of failure to perform the trip, whatever may be the cause, there may be a forfeiture of the pay for the trip; and a failure to arrive at a post office so long after the time set in the schedule as to lose the connexion with a depending mail, shall be considered as equal to a whole trip lost. Which forfeiture may be increased into a penalty not exceeding one hundred dollars, according to the circumstances under which the failure occurred.

8. That the contractor shall be subject for failure to take or deliver a mail, or any part of a mail, for suffering the mail to be wet or otherwise injured, or lost, or destroyed, to a penalty of five dollars, which may be increased to one hundred dollars, according to the size and importance of the mail, and the circumstances under which the failure occurred.

9. That a fine not less than the tenth part and not exceeding the half of the price of a trip may be imposed for each ten minutes' delay of the mail to arrive at the time specified in the schedule.

10. That the contractors shall be answerable for the persons to whom they shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through their unfaithfulness or want of care; and that he will discharge any driver or carrier of said mail whenever required to do so by the Postmaster General.

11. That the schedules being arranged so as to allow seven minutes to each post office for opening and closing the mails generally, and one hour to the distributing post offices, the Postmaster General is to have, nevertheless, the power of extending the time, on allowing the like extension to the contractors, if they shall claim it.

12. That the Postmaster General may alter the schedule, and alter the route, he allowing a pro rata increase of compensation for any additional service required, and for any increased speed, when the employment of additional stock or carriers is rendered necessary.

13. That the Postmaster General may curtail the service or discontinue with it entirely, he allowing one month's extra pay upon the amount deducted, in case he wishes to place on the route a higher degree of service than is contracted for, first offering the privilege to the contractors on the route, of performing such higher service, on the terms that can be obtained; or whenever he shall deem it expedient to lessen the service or to leave such route, or any part of it, out of operation, or to carry the mail by steamboat or railroad cars; provided that reduction of compensation in consequence of reduction of service shall not exceed the exact proportion which the service dispensed with bears to the whole service.

14. That the Postmaster General may annul the contract for repeated failures of the contractors to perform any of the stipulations of the contract; for violating the post office law, or disobeying the instructions of the department; or for assigning this contract without the consent of the Postmaster General first obtained.

15. The said United States covenant with the said contractors to pay as aforesaid, at the rate aforementioned, quarterly, in the months of May, August, November and February.

Provided always, That this contract shall be null and void, in case the contractors or any person that may become interested in this contract directly or indirectly, shall become a postmaster or assistant postmaster. No member of Congress shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon; and this contract shall in all its parts be subject to the terms and requisitions of an act of Congress, passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

And it is mutually covenanted and agreed by the said parties, that this contract shall commence on the first day of July, 1837, and continue in force until the 30th day of June, in the year 1841.

In witness whereof, the said contractors and the Postmaster General have hereunto set their hands and seals the day and year set opposite their names respectively.

DECEMBER 30, 1837.

AMOS KENDALL, [L. S.]

This schedule subject to alteration by the Postmaster General, agreeably to the provisions contained in the twelfth section of the contract.

Leave Utica every day at 5 p. m. Arrive at Ithaca next day by 3 p. m., and in winter by 10 p. m.

Leave Ithaca every day at 3 a. m. Arrive at Utica same day by 10 p. m., and in winter by 5 a. m., next day.

SEPTEMBER 26, 1837.

COURT OF CLAIMS OF THE UNITED STATES.

In the matter of the petition of THOMAS C. NYE, a citizen of the State of New York, *against* THE UNITED STATES.

Interrogatories to be propounded to Malgret P. Van Valkenburg, of the village of Lockport, Niagara county, New York, and David E. Lawrence, of the city of Utica, Oneida county, New York, and others, witnesses produced and sworn on the part of the claimant, Thomas C. Nye, against the United States, for violation of his mail contracts with the Post Office Department.

First interrogatory. What is your name, age, occupation, and place of residence for the last year?

Second interrogatory. Are you acquainted with the nature and character of the claim made by said Thomas C. Nye against the United States, which is the subject of the present inquiry; and if so, have you any interest, either direct or indirect, in said claim?

Third interrogatory. Are you related, and if so in what degree, to the claimant?

Fourth interrogatory. Where was your place of residence and what

was your occupation in the year 1845, and how long previous to said year had you been engaged in such occupation?

Fifth interrogatory. In what business was Thomas C. Nye, the claimant, engaged in 1845 and previous thereto?

Sixth interrogatory. Upon what post routes in the year 1845 did the claimant transport the United States mails? State fully and particularly.

Seventh interrogatory. At what time did the said claimant, in the year 1845, cease to transport the mails on said post routes?

Eighth interrogatory. In the said year, 1845, and before he ceased to transport said mails, what stage property did the claimant have on hand? State fully and in detail, item by item.

Ninth interrogatory. Was the stage property which claimant had on hand in said year used for the purpose of transporting said mail?

Tenth interrogatory. Are you acquainted with the value of said stage property; and if so, what was the value of the same at the time the claimant ceased to transport said mails? State particularly and in detail, as it respects each item of said stage property.

Eleventh interrogatory. Do you know what disposition was made by claimant of said stage property after he ceased to transport said mails; if so, state fully and particularly what became of said property? If any part was sold by claimant, state the prices at which the same were sold.

Twelfth interrogatory. What other property, either in the nature of fixtures or otherwise appertaining and necessary for use in and about the business of transporting said mails, did the said claimant possess at the period above referred to? State fully and particularly, together with the value thereof, item by item; and also what use or disposition was made by the claimant of said fixtures, and what was the depreciation, if any, in the value of the same, by reason of not being used for the purpose of transporting said mails.

Thirteenth interrogatory. Is the stock and vehicles for running post roads valuable for any other purpose; and if so, for what purpose?

Fourteenth interrogatory. What is the depreciation in value, if any, of said stage property when put to other uses—how much per cent.?

Fifteenth interrogatory. Do you know any other matter or thing relative to the claim in question? if so, state the same fully, as if you had been particularly interrogated thereto.

Cross-interrogatories filed by the solicitor of the Court of Claims, in the office of the chief clerk of said court, to be propounded to witnesses in the case of Thomas C. Nye *vs.* the United States, now pending in said Court.

Cross-interrogatory 1. What were your means of information as to property possessed by Nye?

Cross-interrogatory 2. When you speak of his ownership of property and the value of it, do you speak of his interest in it only, or the value of that interest?

Cross-interrogatory 3. So also of the losses sustained in the property, do you estimate the losses on his interest, or the loss on the whole property?

Cross-interrogatory 4. If you know what Nye's interest was in the property, or any part of it, state it particularly, and also who were the other owners or partners, and the extent of their several interests?

Cross-interrogatory 5. Do you know of any actual sales of the property? If so, to whom was it sold? State, if you know, the actual cost of the same property.

Cross-interrogatory 6. Did Nye and his associates keep books on which the purchases and sales of the stock in question were entered? If so, what has become of said books?

Cross-interrogatory 7. Is it not usual for persons in such business to keep books, or to make some contemporaneous memoranda of such transactions? If so, were any kept of them? If not, why not?

Cross-interrogatory 8. If you give in estimates on your examination in chief, state the basis of such estimates, that is, the reasons on which you found them?

COURT OF CLAIMS.

WASHINGTON, *April* 18, 1856.

I certify the foregoing to be true copies of interrogatories and cross interrogatories filed in the office of the chief clerk of the Court of Claims, to be propounded to witnesses in the case of Thomas C. Nye *vs.* the United States.

In testimony whereof I have hereunto set my hand and affixed the [L. s.] seal of said Court, at Washington, on the day and year last above mentioned.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ALBANY, *May* 20, 1856.

STATE OF NEW YORK, *City and County of Albany, ss.*

I certify and return that I have taken the examinations of the above named Malgret P. Van Valkenburgh and David E. Lawrence, on oath on the behalf of the above named claimant, upon the foregoing interrogatories and cross-interrogatories, and in order, and that those respective depositions, duly certified, are hereto annexed and returned herewith.

R. J. HILTON,
Commissioner of Court of Claims.

The Hon. COURT OF CLAIMS.

ALBANY, *June 11, 1856.*STATE OF NEW YORK, *City and County of Albany, ss.*

I further certify and return that I have taken the examinations of Joshua T. Blanchard and John R. Wilkins, on oath, on behalf of the above named claimant, and upon the foregoing direct and cross-interrogatories, and that their respective depositions and testimony, duly certified, are hereto annexed and herewith returned.

R. J. HILTON,
Commissioner of Court of Claims.

The Hon. COURT OF CLAIMS.

NEW YORK, *June 14, 1856.*STATE OF NEW YORK, *City and County of New York, ss.*

I certify and return that I have taken the testimony of the above named Douglass L. Harris, on oath, on behalf of the above named claimant, upon the foregoing interrogatories and cross-interrogatories, and that the respective interrogatories and depositions are hereto annexed and herewith returned.

T. BAILEY MYERS,
Commissioner of Court of Claims.

The Hon. COURT OF CLAIMS,
Washington, D. C.

IN THE COURT OF CLAIMS OF THE UNITED STATES.

THOMAS C. NYE *against* THE UNITED STATES OF AMERICA.STATE OF NEW YORK, *City and County of Albany, ss.*

Be it remembered that on this fifteenth day of May, A. D. 1856, at 1 o'clock p. m. of that day, personally appeared before me, Robert J. Hilton, of the city of Albany, in the State of New York, a commissioner of the Court of Claims, the above named claimant and D. Ira Baker, esq., his solicitor, for the purpose of taking the examination and testimony of Malgret P. Van Valkenburgh, of Lockport, New York, and others, as witnesses on the behalf of the said above named claimant in the above entitled cause or matter of controversy now depending in the said Court of Claims upon the interrogatories and cross-interrogatories duly settled and filed with the clerk of said court, a certified copy whereof is hereto annexed. And the above named witness, Malgret P. Van Valkenburgh, a resident of the village of Lockport, in the State of New York, who, being first duly cautioned and sworn on behalf of the above claimant, deposed and testified as follows:

First interrogatory. What is your name, age, occupation, and place of residence for the last year?

Answer. My name is Malgret P. Van Valkenburgh, aged forty-

eight years, by occupation a lumberman, and have resided for the year last past in the village of Lockport, in the State of New York.

Second interrogatory. Are you acquainted with the nature and character of the claim made by said Thomas C. Nye against the United States, which is the subject of the present inquiry, and if so, have you any interest, either direct or indirect, in said claim?

Answer. I believe I am acquainted with the nature and character of the claim made by said Thomas C. Nye against the United States, which is the subject of the present inquiry. I have no interest, either direct or indirect, in said claim.

Third interrogatory. Are you related, and if so, in what degree, to the claimant?

Answer. The claimant married my sister; he is my brother-in-law.

Fourth interrogatory. Where was your place of residence and what was your occupation in the year 1845, and how long previous to said year had you been engaged in such occupation?

Answer. During the year 1845 I resided at Madison village, in the county of Madison, in the State of New York, and my occupation during said year and the two years previous thereto was that of the general stage agent of Thomas C. Nye, the above claimant.

Fifth interrogatory. In what business was Thomas C. Nye, the claimant, engaged in 1845 and previous thereto?

Answer. The claimant, Thomas C. Nye, during the year 1845, and for two years previous thereto and upwards, was extensively engaged in the staging business and in the transportation of passengers and the United States mails.

Sixth interrogatory. Upon what post routes in the year 1845 did the claimant transport the United States mails? State fully and particularly.

Answer. Upon the following post routes, namely: from Albany to Syracuse, by the way of Cherry Valley; from Utica to Ithaca; from Utica to Binghamton; from Canistota to Hamilton; from De Ruyter to Cooperstown; from Cooperstown, by way of Cherry Valley, to Canajoharie, New York.

Seventh interrogatory. At what time did the said claimant in the year 1845 cease to transport the mails on said post routes?

Answer. On the 30th day of June, 1845.

Eighth interrogatory. In the said year 1845, and before he ceased to transport said mails, what stage property did the claimant have on hand? State fully and in detail, item by item.

Answer. The following described stage property, namely: one hundred and eighty horses, twenty stage coaches, twenty double stage wagons, twenty stage sleighs, forty sets of four-horse harness.

Ninth interrogatory. Was the stage property which claimant had on hand in said year used for the purpose of transporting said mails?

Answer. Yes.

Tenth interrogatory. Are you acquainted with the value of the said stage property, and if so, what was the value of the same at the time the claimant ceased to transport said mails? State particularly and in detail as it respects each item of said stage property.

Answer. I am acquainted with the value of said stage property, and the following was the value of the same at the time the claimant ceased to transport said mails: the one hundred and eighty horses were worth one hundred and fifty dollars each; the twenty stage coaches were worth four hundred and fifty dollars each; the twenty sleighs were worth two hundred and fifty dollars each; the twenty double stage wagons were worth two hundred and fifty dollars each; and the forty sets of four-horse harness were worth fifty dollars a set each.

Eleventh interrogatory. Do you know what disposition was made by claimant of said stage property after he ceased to transport said mails? If so, state fully and particularly what became of said property? If any part was sold by claimant, state the prices at which the same were sold.

Answer. It remained on the hands of the claimant. In 1847 the claimant sold two teams, but the prices he received therefor I do not know and have never heard, and I have no knowledge of his disposition of any more or any other portions of said stage property.

Twelfth interrogatory. What other property, either in the nature of fixtures or otherwise appertaining and necessary for use in and about the business of transporting said mails, did the said claimant possess at the period above referred to? State fully and particularly, together with the value thereof, item by item; and also what use or disposition was made by the claimant of said fixtures, and what was the depreciation, if any, in the value of the same, by reason of not being used for the purpose of transporting said mails?

Answer. The claimant, at the period above referred to, also owned and possessed and used as appurtenant and necessary, in and about this said staging business, the following other and additional property and fixtures, namely: one wagon shop, of the value of two thousand dollars; one blacksmith shop building and necessary tools therein, worth one thousand dollars; one barn, of the value of two thousand dollars; two sheds, worth together seven hundred dollars; and one granary building, of the value of three hundred dollars. These several valuations include the value of the site or land on which said buildings respectively are located and erected. I do not know what use or disposition was made by the claimant of said fixtures or buildings, and the depreciation in the value of the same by reason of not being used for the purpose of transporting said mails was, in my opinion, at least fifty per cent. on the above valuation.

Thirteenth interrogatory. Is the stock and vehicles for running post roads valuable for any other purpose; and, if so, for what purpose?

Answer. I know of no other purpose for which they are valuable.

Fourteenth interrogatory. What is the depreciation in value, if any, of said stage property when put to other uses; how much per cent?

Answer. Seventy-five per cent.

Fifteenth interrogatory. Do you know any other matter or thing relative to the claim in question? if so, state the same fully as if you had been particularly interrogated thereto.

Answer. I know nothing further material.

M. P. VAN VALKENBURGH.

Cross-examination.

First cross-interrogatory. What were your means of information as to property possessed by Nye?

Answer. By being in his service for several years, and being intimately conversant with all his property, business operations, and affairs.

Second cross-interrogatory. When you speak of his ownership of property and the value of it, do you speak of his interest in it only, or the value of that interest?

Answer. In speaking of claimant's ownership of property and the value of it, I mean that the claimant was the sole owner thereof, and its fair value for the uses and purposes for which he had acquired it.

Third cross-interrogatory. So also of the losses sustained in the property, do you estimate the losses on his interest, or the loss on the whole property?

Answer. On the whole property to him as sole owner.

Fourth cross-interrogatory. If you know what Nye's interest was in the property, or any part of it, state it particularly; and also who were the other owners or partners, and the extent of their several interests?

Answer. I know that Nye was the sole owner of said property. He had no partners or co-owners with him who had interest in said property, or any part or portion of it.

Fifth cross-interrogatory. Do you know of any actual sales of the property? If so, to whom was it sold; state, if you know, the actual cost of the same property?

Answer. No, except the sale of two stage teams of four horses each in 1847, to Mr. Moore, of Winfield, New York. I do not know what the price received was, nor do I know what their actual cost was.

Sixth cross-interrogatory. Did Nye and his associates keep books on which the purchases and sales of the stock in question were entered; if so, what has become of said books?

Answer. Nye had no associates in the ownership of said property, nor did he keep any book or books on which the purchases or sales of the stock in question were entered.

Seventh cross-interrogatory. Is it not usual for persons in such business to keep books or to make some contemporaneous memoranda of such transactions? If so, were any kept of them? If not, why not?

Answer. It is not usual in cases where the property is owned by one person solely. Mr. Nye did not consider it necessary, and did not keep any such book or memoranda, to my knowledge.

Eighth cross-interrogatory. If you give estimates on your examination in chief, state the basis of such estimates: that is, the reasons on which you found them?

Answer. The estimates I have stated and given in relation to said property, in my answer to the direct interrogatories, are based on my personal knowledge of said property, and an intimate acquaintance with its condition and fair value.

M. P. VAN VALKENBURGH.

STATE OF NEW YORK, }
City and County of Albany, } ss.

I certify that on this 15th day of May, A. D. 1856, before me personally came Malgret P. Van Valkenburgh, the witness above named, and after having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth in the above entitled cause or matter of controversy, the several interrogatories and cross-interrogatories contained in his foregoing deposition, were written down by me, the commissioner, and then proposed by me to the said witness, and the answers thereto and in their order were written down by me, the commissioner, in the presence of the witness, who then subscribed the said deposition in my presence. The deposition of Malgret P. Van Valkenburgh, of Lockport, in the State of New York, taken at the request of Thomas C. Nye, a citizen of the State of New York, to be used in the investigation of a claim against the United States for violation of his mail contracts with the Post Office Department, and now pending in the Court of Claims of the United States, in the name of the said Thomas C. Nye. The adverse party did not attend and did not object.

R. J. HILTON,
Commissioner of the Court of Claims, at Albany, New York.

Fees of witness : Travel from Lockport to Albany and returning, 466 miles, at 5 cents per mile, \$23 30; witness attending one day before commissioner, \$1 50; commissioner's fees for taking and certifying deposition, affidavit, and certificate, \$5 85; postage on return of interrogatories and deposition, say \$0 21. Total, \$30 86.

COURT OF CLAIMS OF THE UNITED STATES.

THOMAS C. NYE *against* UNITED STATES OF AMERICA.

STATE OF NEW YORK, *City and County of Albany,* ss:

Be it remembered that on this twentieth day of May A. D. 1856, at ten o'clock in the forenoon of that day, personally appeared before me Robert J. Hilton of the city of Albany, in the State of New York, a Commissioner of the Court of Claims, the above named claimant for the purpose of having taken the examination and testimony of David E. Lawrence, (now) of city of Albany, in the State of New York, as a witness on the behalf of the said above named claimant in the above entitled cause or matter of controversy, now depending in the said Court of Claims upon the interrogatories and cross-interrogatories, duly settled and filed with the clerk of the said Court of Claims, a certified copy whereof is hereto annexed.

And the said above named witness David E. Lawrence, formerly of city of Utica, but now of city of Albany, New York, a witness produced on behalf of the said above named claimant, and who, having

been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth relative to the above entitled cause, thereupon deposed, testified, and answered as follows:

First interrogatory. What is your name, age, occupation and place of residence for the last year?

Answer. My name is David E. Lawrence; I am forty years of age; my occupation is that of messenger for the American Express Company; I have resided since the first of May instant, in the city of Albany, and for the previous two years in the city of Utica, New York.

Second interrogatory. Are you acquainted with the nature and character of the claim made by said Thomas C. Nye against the United States, which is the subject of the present inquiry, and if so, have you any interest, either direct or indirect in said claim?

Answer. I am acquainted with the nature and character of the claim made by the said Thomas C. Nye against the United States, which is the subject of the present inquiry; I have no interest whatever, either directly or indirectly in said claim or any part thereof.

Third interrogatory. Are you related, and if so in what degree, to the claimant?

Answer. I am not related in any way to said claimant.

Fourth interrogatory. Where was your place of residence, and what was your occupation in the year 1845; and how long previous to said year had you been engaged in such occupation?

Answer. During the year 1845 I resided at Hamilton village, in the county of Madison, in the State of New York; and my occupation during said year, and the latter half of the year 1844, was that of general stage agent at that place, of the said Thomas C. Nye, the above claimant.

Fifth interrogatory. In what business was Thomas C. Nye, the claimant, engaged in 1845, and previous thereto?

Answer. The claimant Thomas C. Nye, during the year 1845, and for several years previous thereto, was extensively engaged in the staging business, and in the transportation of passengers and their baggage, and the United States mails upon several mail routes in the State of New York.

Sixth interrogatory. Upon what post routes in the year 1845 did the claimant transport the United States mails? State fully and particularly.

Answer. Upon the following post routes, namely: from the city of Albany to Syracuse, by the way of the village of Cherry Valley; from Utica to Ithaca; from Utica to Binghamton; from Canistota to Hamilton; from De Ruyter to Cooperstown; and from Cooperstown by way of Cherry Valley, to Canajoharie; all in the State of New York.

Seventh interrogatory. At what time did the said claimant in the year 1845, cease to transport the mails on said post routes?

Answer. On the last day of June A. D. 1845.

Eighth interrogatory. In the year 1845, and before he ceased to transport said mails, what stage property did the claimant have on hand? State fully and in detail, item by item.

Answer. The following described stage property, namely: one hundred and eighty horses; twenty stage coaches; twenty four-horse stage wagons; twenty four-horse sleighs; and forty sets of four-horse harness.

Ninth interrogatory. Was the stage property which claimant had on hand in said year, used for the purpose of transporting said mail?

Answer. Yes, it was.

Tenth interrogatory. Are you acquainted with the value of said stage property; and if so, what was the value of the same at the time the claimant ceased to transport said mails? State particularly, and in detail as it respects each item of said stage property.

Answer. I am acquainted with the value of said stage property, and the following was the value of the same at the time (June 30, 1845) when the said claimant ceased to transport said mails. The one hundred and eighty stage horses were worth on the average, at least one hundred and fifty dollars each; the twenty stage coaches were worth four hundred and fifty dollars each; the twenty sleighs were worth two hundred and fifty dollars each; the twenty double stage wagons were worth two hundred and fifty dollars each; and the forty sets of four-horse harness were worth fifty dollars each set; all of this stage property was at that time in good order and condition.

Eleventh interrogatory. Do you know what disposition was made by claimant of said stage property after he ceased to transport said mails? If so, state fully and particularly what became of said property; if any part was sold by claimant, state the prices at which the same were sold.

Answer. It remained on the hands and in possession of the claimant until I left his service, which was about the close of the year 1845. I have no knowledge that the claimant ever sold or disposed of any of it, or what has since become of it; how disposed of, or for what prices.

Twelfth interrogatory. What other property either in the nature of fixtures or otherwise appertaining and necessary for use, in and about the business of transporting said mails, did the said claimant possess at the period above referred to; state fully and particularly, together with the value thereof, item by item; and also, what use and disposition was made by the claimant of said fixtures, and what was the depreciation, if any, in the value of the same by reason of not being used for the purpose of transporting said mails?

Answer. At the period above referred to (June 30, 1845,) the said claimant owned, possessed, and used at Madison village, New York, and as appurtenant and necessary to, and in and about his said business of transporting the said United States mails, the following other and additional property and fixtures, namely: a coach shop, which he occupied and used for the building and repairing of his stage coaches, wagons, and sleighs, together with the necessary tools, worth and of the value of two thousand five hundred dollars; a harness shop and fixtures, worth one thousand dollars; a blacksmith shop and fixtures, worth five hundred dollars; two horse stables with shed and granary annexed to each, worth together, two thousand five hundred dollars. This limit of valuation includes only the fair value of the said build-

ings with their fixtures, &c., and not the value of the land they occupied. The said claimant at same time also owned and occupied a barn and stable for the accommodation of his stage horses and property at Hamilton village, New York, and which he built there for that purpose, worth eight hundred dollars exclusive of the land or site, I do not know what use or disposition was made by the claimant of said fixtures or buildings; they all remained in his hands for several years afterwards unoccupied and undisposed of. The fixtures of the coach shop were worth at the said period of time (June 30, 1845,) the sum of five hundred dollars; the fixtures of the harness shop at the same time were worth two hundred and fifty dollars; and the fixtures of the blacksmith shop, at the same time, were worth three hundred dollars; and the depreciation in the value of said fixtures of said buildings by reason of their not being used for the purpose of transporting said mails, was, at least, seventy-five per cent. on such valuation; and the depreciation in the value of the said above mentioned and described buildings, by reason of their not being used for the purpose of transporting said mails, was seventy-five per cent. on their above estimated value.

Thirteenth interrogatory. Is the stock and vehicles for running post roads valuable for any other purpose; and if so, for what purpose?

Answer. They are not.

Fourteenth interrogatory. What is the depreciation in value, if any, of said stage property when put to other uses; how much per cent?

Answer. Very considerable; at least from seventy-five to eighty per cent.

Fifteenth interrogatory. Do you know any other matter or thing relative to the claim in question? if so, state the same fully, as if you had been particularly interrogated thereto.

Answer. I wish here to correct my answer to the fourth interrogatory. I went into the employ of the claimant at Hamilton village, New York, as his general stage agent, in the summer or early in the autumn of 1843, and continued there and in his employment as such general stage agent until the close of A. D. 1845, and during which period of time I was intimately acquainted with the stage property belonging to the claimant, and with its condition, extent, and value.

D. E. LAWRENCE.

Cross-examination.

First cross-interrogatory. What were your means of information as to property possessed by Nye?

Answer. Being in his employ for two years and upwards, as already stated, and being acquainted with his property, seeing it in daily use during that time, and being acquainted with the original cost which he paid for a greater portion of it.

Second cross-interrogatory. When you speak of his ownership of property, and the value of it; do you speak of his interest in it only, or the value of that interest?

Answer. I speak of it as the same was owned by him at the time I have mentioned, and its then value.

Third cross-interrogatory. So also of the losses sustained on the property, do you estimate the losses on his interest, or the loss on the whole property?

Answer. On the whole property above described, and of which the claimant was the sole owner and proprietor?

Fourth cross-interrogatory. If you know what Nye's interest was in the property, or any part of it, state it particularly, and also who were the other owners or partners, and the extent of their several interests?

Answer. I know that said Nye was the sole owner of said property; I never knew or heard that he had any associate or partner who owned or had any interest in said property, or any part thereof.

Fifth cross-interrogatory. Do you know of any actual sales of the property; if so, to whom was it sold? State, if you know, the actual cost of the same property.

Answer. I do not know of any actual sales of the property.

Sixth cross-interrogatory. Did Nye and his associates keep books in which the purchases and sales of the stock in question were entered; if so, what has become of said books?

Answer. I never knew that Nye had associates in the ownership or purchase of said property, or that they or he ever kept books or a book in which the purchases and sales of the stock in question were entered.

Seventh cross-interrogatory. Is it not usual for persons in such business to keep books, or to make some contemporaneous memoranda of such transactions; if so, were any kept of them; if not, why not?

Answer. It is not, I think, customary for sole owners and proprietors of stage property to keep books, or to make contemporaneous memoranda of such transactions. It would be attended with a great deal of difficulty in consequence of the nature of such property; its extent and mode of use; repair and management. Mr. Nye did not consider it necessary to keep or make such entries or memoranda, and did not keep any within my knowledge.

Eighth cross-interrogatory. If you give estimates in your examination in chief, state the basis of such estimates; that is, the reasons on which you found them.

Answer. My estimates of the valuation of the claimant's stage property, and which he used in transporting the United States mails, and also my estimates of its depreciation in consequence of the same not being used for such purpose—stated and given in my examination in chief—is based on my personal knowledge of the character, nature, and extent of such stage property and fixtures, and appertaining and necessary for such use thereof, and from my intimate acquaintance with its use by said claimant.

D. E. LAWRENCE.

STATE OF NEW YORK, }
City and County of Albany, } ss.

I certify that on this twentieth day of May, A. D. 1856, before me personally came David E. Lawrence, of the city of Albany, New York, the witness above named, and after having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, in the above entitled cause or matter of controversy, the several interrogatories and cross-interrogatories contained in his foregoing deposition were written down by me and then proposed by me to the said witness, and the answers thereto, and in their order, were written down by me in the presence of the witness, and who then subscribed the said deposition in my presence.

The deposition and examination of David E. Lawrence, of the city of Albany, New York, taken at the request of Thomas C. Nye, a citizen of the State of New York, to be used in the investigation of a claim against the United States for a violation of his mail contracts with the Post Office Department, and now pending in the Court of Claims of the United States in the name of the said Thomas C. Nye. The adverse party did not attend, and did not object.

I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the said claim or cause named in the said caption. In testimony whereof, I have hereto subscribed my name officially, on the day and year and at the place above written.

R. J. HILTON,

*Commissioner of the United States Court of Claims,
 at City of Albany, in the State of New York.*

Witness' fees: Witness attending 2 days, at \$1 50 per day, \$3. Commissioner's fee for taking and certifying deposition, affidavit, and certificate, \$7 05. Postage on return, estimated, 21 cents. Total, \$10 26.

IN THE COURT OF CLAIMS OF THE UNITED STATES.

THOMAS C. NYE, vs. THE UNITED STATES OF AMERICA.

STATE OF NEW YORK, *City and County of Albany,* ss.

Be it remembered that on this 10th day of June, A. D. 1856, at 10 o'clock in the forenoon of said day, personally appeared before me, Robert J. Hilton, of the city of Albany, in the State of New York, a commissioner of the Court of Claims of the United States, Thomas C. Nye, the above named claimant, for the purpose of taking the examination and testimony of *Joshua T. Blanchard*, a resident of Saratoga Springs, in the State of New York, as a witness on behalf of the above named claimant in the above entitled cause or matter of

controversy now depending in the said Court of Claims of the United States upon the interrogatories and cross-interrogatories duly settled and filed with the Clerk of the said Court of Claims, a certified copy whereof is hereto annexed. And the said witness, *Joshua T. Blanchard*, of Saratoga Springs, in the State of New York, produced on behalf of the above claimant, and being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, relative to the above entitled cause, thereupon deposed and answered as follows:

First interrogatory. What is your name, age, occupation, and place of residence for the last year?

Answer. My name is Joshua T. Blanchard; my age fifty-four years; by occupation a farmer; and am now, and have been for the last year, a resident of Saratoga Springs, in the State of New York.

Second interrogatory. Are you acquainted with the nature and character of the claim made by Thomas C. Nye against the United States, which is the subject of the present inquiry; and if so, have you any interest, either direct or indirect, in said claim?

Answer. I am acquainted with the nature and character of the claim made by the said Thomas C. Nye against the United States, and have no interest, either direct, or indirect in said claim, or any part thereof.

Third interrogatory. Are you related, and if so, in what degree, to the claimant?

Answer. I am not in any way related to the said claimant.

Fourth interrogatory. Where was your place of residence, and what was your occupation in the year 1845; and how long previous to said year had you been engaged in such occupation?

Answer. During the year 1845 I resided at the village of Saratoga Springs, New York, and my occupation during that year was that of a general stage proprietor; and that had been my occupation for about fifteen years previous to said year 1845.

Fifth interrogatory. In what business was Thomas C. Nye, the claimant, engaged in 1845, and previous thereto?

Answer. I do not know personally, but by reputation he was an extensive stage proprietor, and engaged in the staging business, and in the transportation of passengers and the United States mails upon several mail routes in the State of New York.

Sixth interrogatory. Upon what post routes in the year 1845 did the claimant transport the United States mails? State fully and particularly.

Answer. I do not know, and I cannot state particularly.

Seventh interrogatory. At what time did the said claimant, in the year 1845, cease to transport the mails on said post routes?

Answer. I do not know.

Eighth interrogatory. In the year 1845, and before he ceased to transport said mails, what stage property did the claimant have on hand? State fully and in detail, item by item.

Answer. I do not know, and I cannot state items.

Ninth interrogatory. Was the stage property which claimant had

on hand in said year used for the purpose of transporting said mails?

Answer. I do not know anything about it.

Tenth interrogatory. Are you acquainted with the value of said stage property; and if so, what was the value of the same at the time the claimant ceased to transport said mails? State particularly and in detail, and as it respects each item of said stage property.

Answer. I know nothing about the value of said stage property, or any part thereof.

Eleventh interrogatory. Do you know what disposition was made by claimant of said stage property after he ceased to transport said mails? if so, state fully and particularly what became of said property. If any part was sold by claimant, state the prices at which the same were sold.

Answer. I do not know what disposition was made by claimant of said stage property after he ceased to transport said mails. I cannot answer any of the inquiries contained in this interrogatory.

Twelfth interrogatory. What other property, either in the nature of fixtures, or otherwise, appertaining and necessary for use in and about the business of transporting said mails, did the said claimant possess at the period above referred to? State fully and particularly, together with the value thereof, item by item; also what use or disposition was made by the claimant of said fixtures; and what was the depreciation, if any, in the value of the same, by reason of not being used for the purpose of transporting said mails?

Answer. I do not know; I cannot answer any of the matters inquired of in this interrogatory.

Thirteenth interrogatory. Is the stock and vehicles for running post roads valuable for any other purpose; and if so, for what purpose?

Answer. They are not valuable for any other purpose.

Fourteenth interrogatory. What is the depreciation in value, if any, of said stage property when put to other uses; how much per cent.?

Answer. Its depreciation is very large—at least eighty per cent.

Fifteenth interrogatory. Do you know of any other matter or thing relative to the claim in question? If so, state the same fully, as if you had been particularly interrogated thereto.

Answer. I know nothing further material in relation to the claim in question.

J. T. BLANCHARD.

Cross-examination.

First cross-interrogatory. What were your means of information as to property possessed by Nye?

Answer. None whatever beyond the general reputation that he was an extensive stage proprietor; but I never saw any of it, to my knowledge.

Second cross-interrogatory. When you speak of his ownership of

property, and the value of it, do you speak of his interest in it only, or the value of that interest?

Answer. I do not know what interest he had or owned in said property beyond the fact of his reputed ownership.

Third cross-interrogatory. So also of the losses sustained on the property, do you estimate the losses on his interest, or the loss on the whole property?

Answer. When I stated, in my answer to the fourteenth direct interrogatory, the depreciation on stage property when put to other uses, I meant the loss on the whole property.

Fourth cross-interrogatory. If you know what Nye's interest was in the property, or any part of it, state it particularly, and also who were the other owners or partners, and the extent of their several interests?

Answer. I do not know what Nye's interest in said property was, nor that he had any partners or co-owners, nor the extent of their several interests; in short, I know nothing about the matters inquired of in this interrogatory.

Fifth cross-interrogatory. Do you know of any actual sales of the property; if so, to whom was it sold? state, if you know, the actual cost of the same property.

Answer. I know of no sales of the said property, or any part of it, nor what it actually cost.

Sixth cross-interrogatory. Did Nye and his associate keep books in which the purchases and sales of the stock in question were entered; if so, what has become of said books?

Answer. Not to my knowledge.

Seventh cross-interrogatory. Is it not usual for persons in such business to keep books or to make some contemporaneous memoranda of such transactions; if so, were any kept of them; if not, why not?

Answer. No, it is not usual, although some persons in the staging business do keep books in which they enter such transactions; but I do not know that any were kept by the claimant, or why not.

Eighth cross-interrogatory. If you give estimates in your examination in chief, state the basis of such estimates; that is, the reasons on which you found them.

Answer. My estimate of depreciation or loss, the only one I have given in my examination in chief, as stated in my answers to the thirteenth and fourteenth direct interrogatories, are based on my own personal experience and observation, and personal knowledge of my own stage property under similar circumstances.

J. T. BLANCHARD.

STATE OF NEW YORK, *City and County of Albany, ss.*

I certify that on this tenth day of June, A. D. 1856, before me personally came Joshua T. Blanchard, of the village of Saratoga Springs, in the State of New York, the witness above named, and after having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, in the above entitled cause or matter of controversy, then the several interrogatories and cross-interroga-

tories, and in order, were put, and his respective answers to each in same order were written down by me in the presence of the witness, and he then subscribed the said deposition in my presence.

The above is the deposition and examination of the said Joshua T. Blanchard, of Saratoga Springs, New York, taken at the request of Thomas C. Nye, a citizen of the State of New York, to be used in the investigation of a claim against the United States for a violation of his mail contract with the Post Office Department, and now pending in the Court of Claims of the United States in the name of the said Thomas C. Nye. The adverse party did not attend, and did not object.

R. J. HILTON,
Commissioner of Court of Claims of United States,
at Albany, N. Y.

Fees of witnesses: Attending one day before commissioner, \$1 50; travelling 68 miles, from Saratoga Springs to Albany, and back, \$3 40; commissioner's fees, taking and certifying depositions, \$4 60; postage on return, estimated at 12½ cents; amount, \$9 62.

IN THE COURT OF CLAIMS OF THE UNITED STATES.

THOMAS C. NYE *vs.* THE UNITED STATES OF AMERICA.

STATE OF NEW YORK, }
City and County of Albany, } ss.

Be it remembered that on this tenth day of June, A. D. 1856, at five o'clock in the afternoon of said day, personally appeared before me, Robert J. Hilton, of the city of Albany, in the State of New York, a commissioner of the Court of Claims of the United States, at my office, No. 74 State street, in the said city of Albany, New York, Thomas C. Nye, the above named claimant, for the purpose of taking the examination and testimony of John R. Wilkins, of the village of Cohoes, Albany county, New York, as a witness on behalf of the above named claimant, in the above entitled cause or matter of controversy now depending in the said Court of Claims of the United States, upon the interrogatories and cross-interrogatories duly settled and filed with the clerk of the said Court of Claims, a certified copy whereof is hereto annexed; and the said witness, John R. Wilkins, a resident of the village of Cohoes, in the county of Albany, in the State of New York, produced on behalf of the above claimant, and being by me first duly cautioned and duly sworn to testify the truth, the whole truth, and nothing but the truth, relative to the above entitled cause; and being thereupon examined on said interrogatories and cross-interrogatories, and in their due order, thereupon deposed and answered as follows:

First interrogatory. What is your name, age, occupation, and place of residence for the last year?

Answer. My name is John R. Wilkins; I reside at the village of Cohoes, in the county of Albany, and have resided there for the past year; I am fifty-two years of age, and by occupation an inn-keeper.

Second interrogatory. Are you acquainted with the nature and character of the claim made by said Thomas C. Nye against the United States, which is the subject of the present inquiry; and if so, have you any interest, either direct or indirect, in said claim?

Answer. I am acquainted with the nature and character of the claim made by said Thomas C. Nye against the United States; I have no interest therein, either directly or indirectly.

Third interrogatory. Are you related, and if so, in what degree, to the claimant?

Answer. I am not in any way related to said claimant.

Fourth interrogatory. Where was your place of residence, and what was your occupation in the year 1845; and how long previous to said year had you been engaged in such occupation?

Answer. I resided in the village of Cherry Valley, in the State of New York, and was an inn-keeper and stage proprietor at said village during the year 1845; and that had been my occupation for eight years previously at said place.

Fifth interrogatory. In what business was Thomas C. Nye, the claimant, engaged in 1845, and previous thereto?

Answer. He was an extensive stage proprietor, and engaged in the staging business, and the transportation of passengers and their baggage, and also the United States mails, upon several mail routes in the State of New York.

Sixth interrogatory. Upon what post routes, in the year 1845, did the claimant transport the United States mails? State fully and particularly.

Answer. Upon the following post routes, viz: From Albany to Syracuse, by way of Cherry Valley; from Utica to Ithaca; from Utica to Binghamton; from Cannistota to Hamilton; from De Ruyter to Cooperstown; and from Cooperstown, by way of Cherry Valley, to Canajoharie, in the State of New York.

Seventh interrogatory. At what time did the said claimant, in the year 1845, cease to transport the mails on said post routes?

Answer. On or about the first day of July, 1845.

Eighth interrogatory. In the said year 1845, and before he ceased to transport said mails, what stage property did the claimant have on hand? State fully and in detail, item by item.

Answer. The claimant had a large quantity of stage property, consisting of carriages, coaches, sleds, wagons, horses, harness, &c., sufficient and ample for his business as stage proprietor, but I cannot state or give the items, or a particular description of same.

Ninth interrogatory. Was the stage property which claimant had on hand in said year used for the purpose of transporting said mails?

Answer. Yes, it was so used.

Tenth interrogatory. Are you acquainted with the value of said stage property; and if so, what was the value of the same at the time

the claimant ceased to transport said mails? State fully and in detail as it respects each item of said stage property.

Answer. I am not sufficiently acquainted with the value of said stage property to express any certain opinion in regard to the value of the same at the time the claimant ceased to transport said mails, or the value of any part thereof, or to give items in detail.

Eleventh interrogatory. Do you know what disposition was made by claimant of said stage property after he ceased to transport said mails? if so, state fully and particularly what became of said property. If any part was sold by claimant, state the prices at which the same were sold.

Answer. I have no knowledge that claimant ever sold or disposed of any of said stage property; it remained on his hands after he ceased to transport said mails.

Twelfth interrogatory. What other property, either in the nature of fixtures or otherwise, appertaining and necessary for use in and about the business of transporting said mails, did the said claimant possess at the period above referred to? State fully and particularly, together with the value thereof, item by item, and also what use or disposition was made by the claimant of said fixtures; and what was the depreciation, if any, in the value of the same, by reason of not being used for the purpose of transporting said mails.

Answer. The claimant owned and occupied shops, barns, sheds, offices, blacksmith shop and carriage shop, and harness shop, but I cannot state the value of the same or its depreciation, or what disposition was made thereof by claimant.

Thirteenth interrogatory. Is the stock and vehicles for running post roads valuable for any other purpose; and if so, for what purpose?

Answer. They are of little value for any other purpose.

Fourteenth interrogatory. What is the depreciation in value, if any, of said stage property when put to other uses; how much per cent.?

Answer. At least seventy-five per cent. average, on gross valuation.

Fifteenth interrogatory. Do you know any other matter or thing relative to the claim in question? If so, state the same fully, as if you had been particularly interrogated thereto.

Answer. Nothing, except to state that stage property is a very depreciable commodity even when not used. This remark applies to all kinds of stage property, and I speak on this point from actual experience in the stage business.

J. R. WILKINS.

Cross-examination.

First cross-interrogatory. What were your means of information as to the property possessed by Nye?

Answer. I saw his stages and teams when engaged in the business, and was familiar with his business operations and their extent for several years previous to July, 1845.

Second cross-interrogatory. When you speak of his ownership of property, and the value of it, do you speak of his interest in it only, or the value of that interest?

Answer. I speak of him as the sole owner and proprietor of such stage property, and of its value to him as its sole owner and proprietor.

Third cross-interrogatory. So also of the losses sustained on the property, do you estimate the losses on his interest, or the losses on the whole property?

Answer. On the whole property which he then owned and had engaged in the transportation of the mails on the post routes above named.

Fourth cross-interrogatory. If you know what Nye's interest was in the property, or any part of it, state it particularly, and also who were the other owners or partners, and the extent of their several interests?

Answer. He (Nye) was, as I believe and always heard, the sole owner of the stage property used by him, and I never heard that he had any partners or co-owners.

Fifth cross-interrogatory. Do you know of any actual sales of the property; if so, to whom was it sold? State, if you know, the actual cost of the same property.

Answer. I know of no actual sales of the property, or the actual cost of the same.

Sixth cross-interrogatory. Did Nye and his associates keep books in which the purchases and sales of the stock in question were entered; if so, what has become of said books?

Answer. I do not know that Nye or his associates kept books in which he or they entered or kept an account of the purchases or sales of the stock in question; and if there were any such book or books kept, I do not know what has become of the same.

Seventh cross-interrogatory. Is it not usual for persons in such business to keep books, or to make some contemporaneous memoranda of such transactions; if so, were any kept of them; if not, why not?

Answer. It is not usual for persons in such business to keep books, or even to make a contemporaneous memoranda of such transactions. I do not know that the claimant kept or made any, nor can I state why he did not.

Eighth cross-interrogatory. If you give in estimates on your examination in chief, state the basis of such estimates; that is, the reasons on which you found them.

Answer. My estimates are founded on my experience and observations while engaged myself in conducting the staging business for twenty-five years.

J. R. WILKINS.

STATE OF NEW YORK, }
City and County of Albany, } ss.

I certify that on this tenth day of June, A. D. 1856, before me personally came John R. Wilkins, of the village of Cohoes, in the county of Albany, State of New York, the witness above named, and after having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, in the above entitled cause or matter of controversy, then the several interrogatories and cross-interroga-

tories, in order, were put to him by me, and his respective answers to each in same order written down by me in the presence of the said witness, and he then subscribed the said foregoing deposition in my presence. The above is the deposition and examination of John R. Wilkins, of Cohoes village, New York, taken at the request of Thomas C. Nye, a citizen of the State of New York, to be used in the investigation of a claim against the United States, for a violation of his mail contract with the Post Office Department, and now pending in the Court of Claims of the United States, in the name of the said Thomas C. Nye. The adverse party did not attend, and did not object.

R. J. HILTON,

*Commissioner of the Court of Claims of United States,
at Albany, New York.*

Fees of witness, 1 day's attendance, \$1 50. Travel to and from Albany to Cohoes village, 20 miles, \$1. Commissioner's fees for taking and certifying deposition, oaths, certificate, &c., \$4 60. Postage on return, (estimate,) 6 cents. Total, \$7 16.

IN THE COURT OF CLAIMS OF THE UNITED STATES.

THOMAS C. NYE *vs.* THE UNITED STATES OF AMERICA.

STATE OF NEW YORK, }
City and County of New York, } ss.

Be it remembered that on this fourteenth day of June, A. D. 1856, at three o'clock of that day, p. m., personally appeared before me, Theodore Bailey Myers, of the city of New York, a commissioner of the Court of Claims, the above named claimant, and D. John Baker, esq., his solicitor, for the purpose of taking the examination and testimony of Morgan L. Harris, a witness on the behalf of the above named claimant in the above entitled cause or matter of controversy now depending in the said Court of Claims, upon the interrogatories and cross-interrogatories duly settled and filed with the clerk of said court, a certified copy whereof is hereto annexed; and the above named Morgan L. Harris, a resident of the city of New York, a witness produced on behalf of the above named claimant, being by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, relative to the above entitled cause, the questions contained in the within depositions were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner as his answer thereto as follows:

First interrogatory. What is your name, age, occupation, and place of residence for the last year?

Answer. My name is Morgan L. Harris; I reside at No. 12 and 14 College Place, New York; keep the Clermont House; have done so for one year.

Second interrogatory. Are you acquainted with the nature and character of the claim made by said Thomas C. Nye against the United States, which is the subject of the present inquiry; and if so, have you any interest, either direct or indirect, in the said claim?

Answer. I am familiar with the character and facts of the claim made by said Thomas C. Nye against the United States; I know the nature of the claim, but have no interest therein, either direct or indirect.

Third interrogatory. Are you related, if so, in what degree, to the claimant?

Answer. There is no relationship or connexion between the claimant and myself.

Fourth interrogatory. Where was your place of residence, and what was your occupation in the year 1845; and how long previous to said year had you been engaged in such occupation?

Answer. I resided at Canajoharie, Montgomery county, New York, in 1845; I was keeping public house, and pretty heavily engaged in staging and livery business; I had mail contracts previous to and up to that time; one from Canajoharie to Leboharie Court-house, and one from there to Durham, Greene county.

Fifth interrogatory. In what business was Thomas C. Nye, the claimant, engaged in 1845 and previous thereto?

Answer. He was an extensive stage proprietor, and largely engaged in the transportation of the United States mails and of passengers and their baggage upon several mail routes in the State of New York.

Sixth interrogatory. Upon what post routes in the year 1845 did the claimant transport the United States mails? State fully and particularly.

Answer. Upon the post route extending from Albany to Syracuse, by the way of Cherry Valley; upon the route between Utica and Ithaca; on that between Utica and Binghampton; the route between Canastota and Hamilton; that from De Ruyter to Cooperstown; and that from Cooperstown to Canajoharie, via Cherry Valley, all in the State of New York, as I was informed and believe.

Seventh interrogatory. At what time did the said claimant, in the year 1845, cease to transport the mails on said post routes?

Answer. On or about the first day of July, 1845. I think on the first.

Eighth interrogatory. In the said year 1845, and before he ceased to transport said mails, what stage property did the claimant have on hand? State fully and in detail, item by item.

Answer. The claimant had a large stock of stage property, consisting in part of coaches, carriages, sleighs, horses, wagons, and harness, being the usual appliances of a large stage proprietor, and the full equipment necessary for his business. I cannot now particularly designate the items or specify them.

Ninth interrogatory. Was the stage property which claimant had on hand in said year used for the purpose of transporting said mails?

Answer. Yes, it was so used. It was a kind of property indispensable to the carrying on the business.

Tenth interrogatory. Are you acquainted with the value of said stage property; and if so, what was the value of the same at the time the claimant ceased to transport said mails? State fully and in detail as it respects each item of said stage property.

Answer. I am not now able to go into detail as to the value of the stage property owned by the claimant at the time he ceased to transport the mails. Any statements of its value, or of any part, therefore, would be an estimate, and not based on certain knowledge.

Eleventh interrogatory. Do you know what disposition was made by claimant of said stage property after he ceased to transport said mails? If so, state fully and particularly what became of said property. If any part was sold by claimant, state the prices at which the same were sold.

Answer. The claimant had the stage property alluded to on hand after he lost the mail contract. I do not know what he did with it. I do not know of his selling or disposing of it.

Twelfth interrogatory. What other property, either in the nature of fixtures or otherwise, appertaining and necessary for use in and about the business of transporting said mails, did the said claimant possess at the period above referred to? State fully and particularly, together with the value thereof, item by item, and also what use or disposition was made by the claimant of said fixtures, and what was the depreciation, if any, in the value of the same, by reason of not being used for the purpose of transporting said mails.

Answer. I do not know what other property or fixtures he had, but presume he had all that was necessary to carry on the business. It was usual for the stage proprietors to have barns, sheds, shops, &c., at the places where they stabled.

Thirteenth interrogatory. Is the stock and vehicles for running on post roads valuable for any other purpose, and if so, for what purpose?

Answer. They depreciate very rapidly, are generally very unsalable, and, in most cases, of little value. It is very difficult to dispose of that class of property.

Fourteenth interrogatory. What is the depreciation in value of any of said stage property when put to other uses? How much per cent?

Answer. I should put the depreciation at at least seventy-five per cent. This depreciation is always considered by parties engaging in the business of staging, and forms a large sink hole for profits. The wear and tear is so great that property that served the purpose of carrying on the business very well if sold is of little or no value compared to its costs or to its value for service, as it is not suited to other purposes, and can rarely be disposed of at all, particularly coaches. I sold my own stage property at auction last year at a depreciation of from seventy-five to eighty per cent.

Fifteenth interrogatory. Do you know any other matter or thing relative to the claim in question? If so, state the same fully as if you had been particularly interrogated thereto.

Answer. Nothing, except that I speak of the staging business from actual experience, having been long engaged in it, and know the loss sustained by being thrown out of occupation with a large stock like the claimant's on hand was a serious hardship and loss to him.

M. L. HARRIS.

Subscribed and sworn to before me, this 14th day of June, A. D. 1856, by the said M. L. Harris.

T. BAILEY MYERS,
Commissioner for United States Court of Claims.

First cross-interrogatory. What were your means of information as to the property possessed by Nye?

Answer. I was frequently over his routes, in his stables or barns; have conversed with him frequently in reference to his property; have ran in connexion with him for a time, that is, connecting routes, and possessed that knowledge and information that one acquires of his neighbor's business when similar to his own.

Second cross-interrogatory. When you speak of his ownership of property, and the value of it, do you speak of his interest in it only, or the value of that interest?

Answer. I speak of him as being the sole owner and proprietor of the stage property alluded to; I never heard of any other interest in it than his; I considered him the sole owner and proprietor of that property.

Third cross-interrogatory. So also of the losses sustained in the property, do you estimate the losses on his interest, or the losses on the whole property?

Answer. I speak of the property as his solely, and of the losses as his losses on his property, used by him in the transportation of mails on the routes I have named in my direct examination.

Fourth cross-interrogatory. If you know what Nye's interest was in the property, or any part of it, state it particularly, and also who were the other owners or partners, and the extent of their several interests?

Answer. He (Nye) was, as I believe and always heard, the sole owner of the entire property alluded to—I knew him as such; if he had partners I was ignorant of it, and cannot state their names.

Fifth cross-interrogatory. Do you know of any actual sales of the property; if so, to whom was it sold? State, if you know, the actual cost of the same property.

Answer. I know of no actual sales of the property, or the actual cost of the same.

Sixth cross-interrogatory. Did Nye and his associates keep books in which the purchases and sales of the stock in question were entered? If so, what has become of said books?

Answer. I had no knowledge of what books Mr. Nye kept, and, as I have answered, had no knowledge of any associates. If he kept such books containing entries of purchase and sale, I do not know where they are, and have never had them in my possession.

Seventh cross-interrogatory. Is it not usual for persons in such

business to keep books or to make some contemporaneous memoranda of such transactions? If so, were any kept of them? If not, why not?

Answer. Stage proprietors do not usually keep regular books of account when running; also, as to purchases or sales of stock or appendages; I never did. If I bought a horse or a coach I made no entry, only keeping accounts of receipts from passengers. This was the usual mode when there were not partnership accounts and separate interests.

Eighth cross-interrogatory. If you give in estimates on your examination in chief, state the basis of such estimates, that is, the reasons on which you found them.

Answer. My estimates are founded on my experience, and that experience was derived in pursuing a similar business for many years.

MORGAN L. HARRIS.

Subscribed and sworn to before me, on the said 14th day of June, A. D. 1856, by the said Morgan L. Harris.

T. BAILEY MYERS,

Commissioner of United States Court of Claims.

And I, the said commissioner, do further certify that the said interrogatories and cross-interrogatories were duly filed with the clerk of this court.

In witness whereof, I have set my hand to this certificate, at the city of New York, on the day and in the year first above written.

T. BAILEY MYERS,

*Commissioner of the Court of Claims
of the United States, at New York.*

Fees of witness, \$1 50; commissioner's fees for taking and certifying deposition, \$4 60; postage, 12 cents; total, \$6 22.

DISTRICT OF COLUMBIA, }
Washington County, } ss.

On this 29th day of December, A. D. 1856, personally came John E. Reeside, the witness within named, and, after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of John E. Reeside, taken at the request of Thomas C. Nye, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Thomas C. Nye *vs.* The United States.

The adverse party was not notified, it being understood that notice was waived, and did not attend.

A. AUSTIN SMITH, *Commissioner.*

Commissioner's fees, \$6 90

Witness' fees, 1 25

The deposition of John E. Reeside, taken at the request of Thomas C. Nye, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Thomas C. Nye *vs.* The United States.

General interrogatory by the commissioner. What is your name, occupation, age, and where you resided for the past year? Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any degree related to the claimant?

Answer. My name is John E. Reeside; a mail contractor; about thirty-seven years of age, and have resided in Georgetown, in the District of Columbia, for the last seven years. I am not interested in this claim, and am not related to the claimant.

First interrogatory by solicitor of the claimant. What opportunities have you had to become acquainted with the business of carrying the mails in stage coaches?

Answer. This has been the business of my life; from the age of thirteen years to my majority, in managing for my father, and since then on my own account.

Second interrogatory. State what, in your judgment, would be the depreciation in value of stage property, coaches, horses, harness, and fixtures, if the same should be thrown out of its intended employment and forced to find other uses.

Answer. On horses, the depreciation would be not less than 60 per cent., and from that to 75 per cent.; on coaches and harness, not less than 75 per cent. My experience has shown the depreciation to be greater. The same is the case with sleighs and wagons.

Third interrogatory. Please explain the cause of this great depreciation in stage property when diverted from its intended use.

Answer. As to horses, the use of them at rapid speed, with heavy loads, causes them to become stiff and sore, their feet to give out; and those same horses sold with the harness on hooked to a coach, as it is usual for a contractor purchasing from another contractor to ride behind the team hitched up, would sell for a price far exceeding that they would bring if led out of the stable by a halter. Their service in stage coaches induces habits which render them unfit and unsafe for other service, while they continue to be very efficient as *stage* horses; so much so that the timidity of people to purchase stage horses has become proverbial—I mean purchases for any other use. As to coaches, sleighs, wagons, and harness, they are worth very little for any other purpose. I have frequently had coaches on hand for a year before I could sell them for one-fourth of their value for any other purpose. I have frequently sold a set of harness for four horses at from \$12 to \$15 which cost from \$50 to \$75.

Fourth interrogatory. Do you know the witnesses, James Upperman, John L. Whaley, and Wesley McNeir? If yea, state what opportunities they have to know the value of stage property and the depreciation when diverted to other uses.

Answer. I have known John L. Whaley as an omnibus driver for the last six years; never knew him as a stage man. James Upper-

man drove omnibus for me in this city. I never knew him as a stage driver on a mail route. I have known him about ten or twelve years, and always as an omnibus driver, in Philadelphia, before he came here. Wesley McNeir was an hostler in my stable in Georgetown. I have since seen him driving an omnibus for Vanderwerken. I never knew him to drive a stage or four horses. I do not think these men competent to judge of the value of stage property, being inexperienced in this business, as far as I know of them.

Fifth interrogatory. Is it or is it not customary, when two or more parties take a mail contract jointly, for each party to select some portion of the road and stock it, and run separately over their respective portions of the route?

Answer. It is usual to do so. The passenger fare on through and way passengers, together with the mail pay, is divided among the parties at pro rata per mile, according to the number of miles run by each. It is sometimes agreed that the way fare received on each division of the route shall be retained by the party running the same, and the through fare and mail pay is only divided among the parties.

General interrogatory by commissioner. Do you know of any other matter material to the claim in question?

Answer. I do not, except that the keeping of a large number of horses, at an average cost of about forty cents per day each, without employment for them, renders it exceedingly expensive and onerous, and induces the proprietor to sell at a sacrifice.

J. E. REESIDE.

Witness: A. AUSTIN SMITH, *Commissioner*.

DECEMBER 29, 1856.

DISTRICT OF COLUMBIA, }
Washington County. } ss.

On this 18th day of December, A. D. 1856, personally came John L. Whaley and James Upperman, the witnesses within named, and, after having been sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner and then proposed by him to each of the witnesses; and their several and respective answers thereto were written down by the commissioner in the presence of the several witnesses, who each subscribed his respective deposition in the presence of the commissioner.

The depositions of John L. Whaley and James Upperman, taken at the request of the United States, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Thomas C. Nye *vs.* United States.

Notice waived, neither party present.

A. AUSTIN SMITH,
Commissioner.

Witness' fees	\$2 50
Commissioner's fees	6 62

Deposition of John L. Whaley, taken at the request of the United States, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Thomas C. Nye *vs.* The United States.

General interrogatory by the commissioner:

What is your name, occupation, age, place of residence now and for the past year. Have you any interest, direct or indirect, in the claim which is the subject of inquiry; and are you in any degree related to the claimant?

Answer. My name is John L. Whaley, a stage driver by occupation, aged fifty-two years, and am now, and have been, a resident of Washington city for the past year. I have no interest, direct or indirect, in the claim which is the subject of inquiry, and do not know the claimant.

Interrogatories by the United States Solicitor:

First interrogatory. Are you acquainted with stage property, and if so, what have been your means of knowledge?

Answer. I am acquainted with stage property of all kinds, and have derived my knowledge by having been engaged in staging and hacking for the past thirty years.

Second interrogatory. What would be the probable depreciation of stage property when suddenly diverted from the purposes of staging?

Answer. If a road be thoroughly stocked with everything appertaining to a stage route, and the use of the property be suddenly stopped or diverted, the depreciation on the whole stock would be about 25 per cent.

Third interrogatory. State particularly the depreciation upon horses, harness, stages or coaches, and other vehicles in said business, and also the depreciation on other property, such as coach shops, harness shops, blacksmith shops, stables, &c., connected with the running of stages?

Answer. The depreciation I have stated to be about 25 per cent. on the whole; this I state from my experience. I cannot state particularly what would be the amount of depreciation on the different articles mentioned.

Fourth interrogatory. What would be the depreciation of such property as referred to if put to other uses?

Answer. I cannot answer this question without knowing to what use the property might be put to; for it might be profitable, and it might not be.

General interrogatory by commissioner:

Do you know of any other matter relative to the claim in question?

Answer. I do not.

JOHN L. WHALEY.

In presence of—

A. A. SMITH, *Commissioner.*

DECEMBER 18, 1856.

Rep. C. C. 177—4

Deposition of James Upperman, taken at the request of the United States, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Thomas C. Nye *vs.* The United States.

The witness, James Upperman, having had proposed to him the same interrogatories as were proposed to the witness John L. Whaley, made part of the return hereof, answers and says as follows to—

General interrogatory by commissioner. My name is James Upperman. I am now a keeper of a gate at the Capitol; aged thirty-nine years; reside now in the city of Washington, and have been a resident of the same place for four years past. I have no interest, direct or indirect, in the claim in question; am not acquainted with the claimant, and not in any way related to him.

To the first interrogatory by United States Solicitor: Answer. I am acquainted with stage property. I was mail agent and mail carrier on an express horse route in North Carolina for two years and upwards in the employ of Messrs. King & Williams. I drove a stage for two or three months on an adjoining route, and I was in the employ of G. Vanderwerken, proprietor of an omnibus line between Georgetown and Washington, for four years, three years of which time I was agent, having charge of the stock and coaches, and one year I was a driver.

To the second interrogatory: Answer. Including all kinds of stage property, horses, coaches, harness, &c., the depreciation would be about twenty per cent. if the same were diverted from their use suddenly.

To the third interrogatory he answers: I cannot state the depreciation on the articles enumerated separately. My answer to the foregoing interrogatory is all I can say.

To the fourth interrogatory he answers: I do not know.

To the last general interrogatory by commissioner he answers: I do not know of any other matter.

JAMES UPPERMAN.

In presence of—

A. A. SMITH, *Commissioner.*

DECEMBER 18, 1856.

DISTRICT OF COLUMBIA, *Washington County, ss.*

On this 19th day of December, A. D. 1856, personally came William Wesley McNeir, the witness within named, and after having been sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the commissioner, who then subscribed the deposition in the presence of the commissioner.

The deposition of William Wesley McNeir, taken at the request of the United States, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Thomas C. Nye *vs.* The United States.

Notice waived. Adverse party present, and did not object.

A. AUSTIN SMITH,
Commissioner.

Fees of witness, \$1 25 ; commissioner's fees, \$5 90.

General interrogatory by commissioner. What is your name, occupation, and age? Where have you resided during the past year? Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any degree related to the claimant?

Answer. My name is William Wesley McNeir, an omnibus driver by occupation, aged thirty-five years, and have resided during the past year in Georgetown, District of Columbia. I have no interest in the claim in question, and am not related to the claimant.

Interrogatories by the United States Solicitor :

First interrogatory. Are you acquainted with stage property, and if so, what have been your means of knowledge?

Answer. I am acquainted with stage property, and have been in the business of omnibus staging for five or six years.

Second interrogatory. What would be the probable depreciation of stage property when suddenly diverted from the purposes of staging?

Answer. Including all stage stock, the depreciation would be from twenty to twenty-five per cent.

Third interrogatory. State the depreciation particularly upon horses, harness, stages, or coaches, and other vehicles in said business, and also the depreciation on other property, such as coach shops, harness shops, blacksmith shops, stables, &c., connected with the running of stages?

Answer. About ten per cent. on horses and harness, and on coaches and the rest of the stock mentioned about twenty-five per cent.

Fourth interrogatory. What would be the depreciation of such property as referred to if put to other uses?

Answer. I cannot say.

General interrogatory by commissioner. State whether you know of any other matter relative to the claim in question?

Answer. I do not.

WILLIAM WESLEY ^{his} X McNEIR.
mark.

Witness :

A. A. SMITH, *Commissioner.*

DECEMBER 19, 1856.

DISTRICT OF COLUMBIA, *Washington county, ss.*

On this 30th day of December, A. D. 1856, personally came Gilbert Vanderwerken, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Gilbert Vanderwerken, taken at the request of the United States, to be used in the investigation of a claim against the United States, in the name of Thomas C. Nye *vs.* The United States.

The adverse party was not notified, it being understood that notice was waived, and did not attend.

A. AUSTIN SMITH,
Commissioner.

Fees of witness, \$1 25; commissioner's fees, \$6 40.

Deposition of Gilbert Vanderwerken, taken at the request of the United States, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Thomas C. Nye *vs.* The United States.

Interrogatory by the commissioner. What is your name, occupation, and age, and where have you resided during the past year? Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any degree related to the claimant?

Answer. My name is Gilbert Vanderwerken, a coachmaker, and proprietor of an omnibus line between Georgetown and the Navy Yard at Washington city, aged about forty-six years, and have resided in Georgetown for the past five years; I am not interested in the claim in question, and do not know the claimant.

Interrogatories by the Solicitor of the United States:

First interrogatory. Are you acquainted with stage property, and if so, what have been your means of knowledge?

Answer. I have been engaged in the building of stage coaches and omnibusses, and running them since 1835, and am acquainted with that kind of property.

Second interrogatory. What would be the probable depreciation of stage property when suddenly diverted from the purposes of staging?

Answer. If stage property was suddenly diverted from its intended use in the fall of the year, I think the depreciation would be about forty or forty-five per cent. If this diversion was made in the spring, the depreciation would be about from twenty-five to thirty-five per cent.

Third interrogatory. State the depreciation particularly upon horses, harness, stages or coaches, and other vehicles in said business, and also the depreciation on other property, such as coach shops, harness shops, blacksmith shops, stables, &c., connected with the running of stages.

Answer. On horses the depreciation would be the highest; in the fall of the year, the depreciation would be as great as fifty-five per cent.; in the spring of the year, it would be from thirty to thirty-five per cent. On coach stock, I think the depreciation would be about thirty per cent., and on harness about the same. On coach, harness and blacksmith shops, and stables connected with a line in running order, I think the depreciation would be about sixty per cent. if suddenly diverted from the purposes intended.

Fourth interrogatory. What would be the depreciation of such property as referred to if put to other uses?

Answer. I do not think that the depreciation would be much less than what I have stated, as I had in view in making my former answers that the property would be sold for other uses.

Interrogatory by the commissioner. Do you know of any other matter relative to this claim?

Answer. I do not.

G. VANDERWERKEN.

POST OFFICE DEPARTMENT,

Contract Office, July 8, 1858.

SIR: I am instructed by the Postmaster General to refer you for information in regard to the case of Thomas C. Nye, of New York, late mail contractor, to papers which accompanied the annual report to the President of Postmaster General Johnson, dated December 1, 1845; being copies of a letter addressed to him by sundry contractors in New York and the New England States, of the date of April 12, 1845, and his reply thereto, dated April 17, 1845. A copy of the circular or "supplementary notice" referred to in these papers, of the 8th March, 1845, is enclosed.

Your note of the 27th ultimo states that the claim of Nye is for "breach of law and violation of contract." No law of Congress ever existed requiring successful bidders to take the stock of their predecessors; the section of the act of March 8, 1825, (4th volume Stat. at Large, page 103,) referred to in the petition, having no bearing on the subject; but there was a regulation of the department to that effect, which is correctly quoted in the petition. The enforcement of this regulation was forbidden by the 18th section of the act of March 3, 1845, and it was the object of the "supplementary notice" of March 8 to make this fact known to all concerned.

Respectfully, your obedient servant,

WM. H. DUNDAS,

Second Assistant Postmaster General.

M. BLAIR, Esq.,

Solicitor Court of Claims Washington, D. C.

POST OFFICE DEPARTMENT,
January 29, 1857.

DEAR SIR: In reply to your note of the 27th instant, enclosing the petition of Thomas C. Nye to the Court of Claims, I beg leave to say that the "regulation" 13, therein quoted, was, as stated by the petitioner, one of the "notes" attached to the advertisement inviting proposals for carrying the mail in New York from 1841 to 1845, and had been in use for many years in all the advertisements for mail letting throughout the Union, until the passage of the act of Congress of March 3, 1845, containing this provision: "Nor shall any new contractor hereafter be required to purchase out or to take at a valuation the stock or vehicles of any previous contractor for the same route;" since which time it has been omitted. It was a regulation or requirement of the department only and founded on no law of Congress. In the advertisement of the New York routes from 1845 to 1849, the regulation again appears; but this advertisement bears date and was issued prior to the passage of the act referred to. Bidders were informed of the passage of this act by a "supplementary notice," dated March 8, 1845, and extensively circulated throughout the State, and correspondence on the subject took place between Mr. Nye and other contractors and Postmaster General Johnson, which was communicated to Congress and printed with the annual report of the department, dated December 1, 1845.

I am, very respectfully, your obedient servant,

JAMES CAMPBELL.

Hon. GEORGE P. SCARBURGH,

Court of Claims, Washington, D. C.

POST OFFICE DEPARTMENT,
December 30, 1856.

SIR: In answer to your inquiries of the 23d instant I have to state that the following individuals were the successful bidders, at the lettings in the spring of 1845, for the routes referred to by the petition of Mr. T. C. Nye, viz:

Route 1024, (1025 old,) Utica to Ithaca, N. Randall.

Route 1025, (1006 old,) Utica to Binghamton, C. A. Stevens & Co.

Routes 983 and 997, (995 old,) De Ruyter to Cherry Valley, L. R. Hopson for the part to Cooperstown, R. Rudd for the residue.

Routes 922 and 994, (913 and 987 old,) Albany to Syracuse, George W. White for the part to Cherry Valley, W. P. Holdridge for the balance.

Route 1022, (1019 old,) Hamilton to Canastota, N. Buckingham.

None of these parties were old coach contractors.

By the 13th note to the advertisement, recited in Mr. Nye's petition, it will be seen that the accepted bidder for new service on coach routes was not required to buy out the stock of a previous contractor, provided he had the necessary stock of his own. It often happened

that persons not engaged in carrying the mails ran accommodation or opposition stages on the department's routes. Such individuals, becoming the successful bidders for the routes, would not, of course, be required to purchase the stock of superseded mail contractors, as they possessed sufficient for their necessities already.

It is impossible, therefore, for the department to answer positively, at this late period, the query of the Court as to the possession, or the contrary, by the persons who superseded Mr. Nye on his routes in 1845, of the stock and other property necessary for the performance of their contracts.

Very respectfully, your obedient servant,

JAMES CAMPBELL,
Postmaster General

S. H. HUNTINGTON, Esq.,
Chief Clerk of the Court of Claims.

Post Office Contracts—Supplementary Notice.

A part of the 19th section of the act of Congress entitled "An act to reduce the rates of postage," &c., approved March 3, 1845, is in the following words :

"*And be it further enacted*, That it shall be the duty of the Postmaster General, in all future lettings of contracts for the transportation of the mails, to let the same, in every case, to the lowest bidder, tendering sufficient guaranties for faithful performance, without other reference to the mode of such transportation than may be necessary to provide for the due celerity, certainty and security of such transportation; nor shall any new contractor hereafter be required to purchase out, or take at a valuation, the stock or vehicles of any previous contractor for the same route."

Bidders for contracts under the advertisement, now in course of publication, for the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York, are hereby notified that the contracts will, agreeably to the foregoing law, be awarded to the lowest bidder for carrying the mail, provided he tenders sufficient guaranties for the faithful performance of the service on the days and within the hours specified in the advertisement, without other reference to the mode of transportation than may be necessary to provide for the due celerity, certainty, and security of such transportation; and that accordingly proposals to carry the mails in a mode inferior to those specified for the routes in the pending advertisement will be considered, provided such inferior mode shall give the speed called for in the schedule, and shall afford due protection and security to the mails.

Bidders should be careful to furnish adequate guaranties, and will observe the form of guaranty given in the advertisement.

The 13th note to the advertisement, requiring the under bidders to

take the stock of the present contractors in certain cases, is, in pursuance of the act aforesaid, hereby abrogated.

The immediate attention of all disposed to bid for mail contracts is called to the advertisement issued in December and January last, published in the *Madisonian*; and for the State of Maine in the *Portland American*, *Augusta Age*, and *Bangor Democrat*; for New Hampshire in the *Portsmouth Gazette*, *Hill's Patriot*, and *Haverhill Republican*; for Vermont in the *Montpelier Patriot*, *Bennington Gazette*, and *Woodstock Spirit of the Age*; for Massachusetts in the *Boston Post*, *Boston Times*, and *Worcester Palladium*; for Rhode Island in the *Providence Gazette*; for Connecticut in the *New Haven Register*, and *Norwich News*; and for New York in the *New York Plebian*, *Albany Argus*, *Plattsburgh Republican*, *Syracuse Empire*, *State Democrat*, *Rochester Advertiser*, *Buffalo Gazette*, and *Norwich Journal*. The advertisement will be found also in pamphlet form at the post offices at the ends of the routes.

The last day for receiving bids at the General Post Office is the 15th April, 1845, at 9 o'clock, a. m.

The advertisement states the number of trips required and between what hours they are to run. These are to be conformed to in the proposals; but the proposer will be allowed to bid for carrying the mail in such mode as he chooses, without regard to the conveyance specified in the advertisement, carefully observing that he is to convey it in the time set, and in such way as to give it full protection and security.

C. JOHNSON,
Postmaster General.

POST OFFICE DEPARTMENT, *March 8, 1845.*

UNITED STATES COURT OF CLAIMS.

THOMAS C. NYE *vs.* THE UNITED STATES.*Claimant's Brief.*

The 1st section of the act of 1825 (4 Stat. at Large, 102) authorizes the Postmaster General to "provide for the carriage of the mails on all post roads that are or may be established by law, and as often as he, having regard to the productiveness thereof and other circumstances, shall think proper."

These very general and comprehensive powers are restrained in only two particulars, viz: requiring contracts to be made after twelve weeks' advertisement, and limiting them to the term of four years.—(Sec. 10th, same act.) The last section of the act repeals all prior laws.

Under this broad power, the "regulation" quoted in the petition was established by the department. It was regularly inserted in all the advertisements, even down to that of December, 1844. This is not disputed; but we have proved it by the production of the books from the department, containing the advertisements for a series of years.

The Postmaster General, in his report of December 1st, 1845, (1st vol. Ex. Doc., 1st sess. 29th Cong., p. 852,) recognizes the "regulation of the department which required the under bidder, in certain cases, to take the stock of the former contractor."

The Solicitor, who has access to the department, admits that the "regulation" was established and acted upon down to the passage of the act of 1845. He disputes only the operation and effect claimed for it.

The "regulations" of the departments, when not contrary to law, are themselves laws. They are recognized as such in the act which establishes this honorable Court, and in the very section which defines its jurisdiction.—(10 Stat., 612.)

This regulation or law of the department enters into and forms part of the contract. It was evidently so intended. The bidder takes the contract subject to the obligation, under proper circumstances, to buy the stock of his predecessor, and with the right to claim the same advantage from his successor. If the rule had not this double operation, it was most unwise and pernicious in its effects upon the interests of the government. For, if it was designed only to force the new contractor to buy old stock at valuation, without reference to a similar right at the end of his term, then its only influence would have been to increase the amount of his bid and enhance the cost of mail transportation, without any advantage whatever to the government. On the other hand, if the rule was designed to operate both at the beginning and the end of the term, it was judicious and beneficial to the interests of the department. This latter is the only rational construction which can be put upon the regulation.

The requirement would never have been made at any of the lettings if the department had not been bound by the pledge of its good faith given to every contractor who made his bid under the regulation. It was for the benefit of the old contractor; it was always a burden and a disadvantage to the new contractor, unless he too should have the right to claim its benefit at the end of his term.

It is obvious that the right arising from the regulation was a material consideration in the mind of the contractor when he made his offer. When he agreed to be liable to take the stock of the old contractor, he must have estimated the value to himself of a similar liability on the part of his successor. It is evident, if he had omitted this latter consideration, his bid would have been different. A consideration for this pledge on the part of the government is therefore necessarily involved in the transaction.

In what manner and to what extent, usages or customs, and laws, enter into and control the terms of written contracts without being specially stated in them, may be seen in the following authorities: *Dorsey vs. Eagle*, 7 Harr. and Gill, 321; *Stultz vs. Dickey*, 5 Binn, 285; *Carson v. Blaze*, 2 *ibid*, 187; *Van Ness vs. Pacard*, 2 Pet. 137; *Hutton vs. Warren*, 1st M. & W. 466; *Boorman vs. Johnson*, 12 Wend. 574; *Renner vs. Bank of Columbia*, 9 Wheat. 581, '84, '85; 4 Phill. on Ev., C. & H.'s notes, 1409 and 1456; Story's Con. of Laws, 225, '6, '7. If such be the force of a mere usage or custom, much greater would be that of a departmental regulation, having all the authority of law.

It has been suggested that the regulation might have the effect of extending the contract beyond the term of four years. But this view cannot be correct. The old contract ends at the moment when the new one begins. The regulation itself requires the new contractor to give the old one "*early notice of his intention to take or not to take his stock.*" The evident object was to secure the unbroken continuance of the service by such timely arrangements as were necessary for that purpose. The arrangement did not extend the contract one moment beyond its legitimate term. As soon as the new contract was made, the regulation became attached, and executed itself at the end of the new term. It was a permanent subsisting rule or law, operating upon and controlling the several contracts when respectively made; but the contracts themselves did not partake of the permanence of the rule, or derive from it any extension whatever beyond their stipulated terms.

It is also objected that the old contractor was not compelled to sell to the new contractor, while the latter was bound to buy or forfeit his bid; and therefore, it is said, there was no mutuality. This view is based upon the misapprehension that the obligation was between the old and the new contractor, whereas it was only between the government and the respective contractors. The government pledged itself to the old contractor to give him the option at the end of his term to sell or not to sell his stock at a fair valuation to the new contractor; and at the same time, it also pledged itself to force the new contractor to abide by the choice of the old one in this par-

ticular, upon pain of losing his contract and having it transferred to the other. This option or privilege, of selling or not selling, was valuable to the old contractor. It is this valuable privilege of which the claimant was deprived by the act of 1845, and for the loss of which he now claims damages. Nothing can be more clear than the mutuality, materiality, and controlling character of this positive stipulation between the government and the old contractor. It was an inducement held out by the government of its own accord, enacted into a law of the department, and embodied in all its advertisements, for the express purpose of operating upon the bids of contractors. To say it had not this effect would be to stultify the department, as well as to repudiate its plighted faith.

The act of March 3, 1845, inaugurated a new policy. It prohibited the Postmaster General from "having regard to the other circumstances" which, by the act of 1825, he was required to consider in providing for the carriage of the mails. He was forbidden to look to the incidental object of facilitating travel in connexion with the carriage of the mails, and he was not to take into consideration the interests, or the effects upon the department, of competing lines of stage coaches on the mail routes. Under the former policy of the government, all these important considerations entered into the policy of the department, and its regulations were made accordingly. The one in question was undoubtedly designed, by giving some degree of security to the large investments of the contractor, to save the department from the fluctuating and uncertain influence of the competition and combination of the powerful class of stage proprietors. It might well have considered this particular provision as necessary to place the service upon a substantial footing, so as to secure fair and reasonable bids from the contractors. The regulation was well adapted to the circumstances under which the department was acting up to 1845, and to the policy which had been established under the previous laws of Congress.

The Postmaster General, in his report of December 1, 1845, boasts of having saved \$250,000 at the lettings in April of that year, for the New England States and New York alone. This immense saving was accomplished, in part, by the sacrifice of the claimant's rights under his contract. For this very purpose, and solely with a view to economy in the service, the regulation aforesaid was abolished.

The present claimant does not presume to attack the altered policy of the new law. But he insists that this new policy could not have been put in operation, and, in fact, was not carried into effect without a serious sacrifice of his own rights under his then existing contract. The advertisements for the new service were published in December, 1844, and the contracts were to be let, and were actually let, in April following. By joint resolution No. 13, approved the same day, (March 3, 1845,) the act itself was not to go into effect until the 1st of July following. By his proclamation of the 8th of March, the Postmaster General abrogated the old regulation, and, to that extent, abrogated the old contracts, before the new law went

into operation. This he did upon the ground that the new service was to commence on the 1st of July. Whether this was, or was not, the proper construction of the act, is not now, in the least degree, material; for whether the contract was abrogated by the Postmaster General without law, or by virtue of the true construction of the act of Congress, the claimant, in either case, has been deprived of his just rights and is entitled to full remuneration. He was left with fifty thousand dollars' worth of stock upon his hands, and was deprived of the advantage, in disposing of it, which was guarantied to him by his contract with the department. The fact that the advertisement of December, 1844, contained the regulation in question, was an admission on the part of the government, if any such admission were necessary, that the claimant was entitled to its benefit.

The government having thus (for wise purposes it may be) abrogated an important part of the claimant's contract, the latter is entitled to the full amount of damages suffered in consequence of the act. He is not bound to show anything more than the breach on the part of the government, without any fault of his own, and the loss which it occasioned.

The letter of the department, in answer to inquiries by the court, admits that the new contractors were previously unknown to the department as contractors, and, *prima facie*, had not the stock necessary for the service. Such is the presumption of law, and the claimant is not bound to prove a negative. If the fact were not in accordance with this presumption, the government would undoubtedly have proved it. The contract having been abrogated by the legislative power, the claimant could have had no right to call upon the new contractor, or in any particular to inquire into his business. The government had absolved the new contractor from all liability, not having made it a condition that he should take the old stock, or surrender the contract to his predecessor.

Neither did the claimant forfeit his right to run an opposition line of coaches on the routes. The government had thrown the property on his hands, not giving him the opportunity to sell to the new contractor. He had the perfect right to find for it whatever use he could, without forfeiting his claim to damages from the government. But he did not so employ his stock. The proof is, that the stock remained for some time useless on his hands—the horses consuming provender, and the coaches and harness depreciating by rust and rot. This fact is sufficiently clear from the testimony of the witnesses; but the Solicitor has introduced the affidavit of the claimant and the statements of his original petition to Congress, in which the fact is positively stated and sworn to. But, as we are not required to prove a negative, the burden of proof in this respect, also, is upon the government.

It only remains to show the actual loss of the claimant. This we have done by the most ample proof, showing the great depreciation of value in such property when thrown out of its legitimate employment. We have not followed every separate horse, &c., to the auctioneer's block, or to the hands of the purchaser. This would

have been an endless task, most unreasonable to require at the hands of the claimant.

The following is a statement of the items of stock on hand actually employed by the claimant in carrying the mails:

180 horses, at \$150 each	\$27,000
20 coaches, at \$450 each	9,000
20 sleighs, at \$250 each	5,000
20 wagons, at \$250 each	5,000
40 sets harness, at \$50 per set	2,000
	48,000

The testimony of the witnesses as to the depreciation varies from 30 to 80 per cent.; the average would be 55 per cent.; and this would make the loss amount to \$26,400.

This is claimed to be the loss sustained by the claimant. No other rule for estimating it has been, or probably can be, suggested by the Solicitor. The principle involved seems to have been admitted in the reports made by the committees of both Houses of Congress, and in the bill which was passed by the Senate of the United States, and which would doubtless have passed the lower House, if it had been acted on at all.—(See Senate Rep. 191, Bill No. 307, 1st sess. 33d Cong.)

The petitioner claims interest upon his losses. If this cannot be allowed, he at least begs that the Court will consider the hardship of his case; the arbitrary, even if politic, act of the government, in destroying his rights, without at the same time providing indemnity; and finally, the long delay and expense which have attended his effort to obtain justice. These considerations ought to secure an allowance in the shape of damages fully equal to the loss, with interest to the present day.

FRED. P. STANTON,
For the Claimant.

IN THE COURT OF CLAIMS—No. —.

THOS. C. NYE *vs.* THE UNITED STATES.

Solicitor's Brief.

The case stated by the petitioner is, that he became a mail contractor in the year 1837, and that his contracts were renewed in 1841. At the time these contracts were taken, there were notes attached to the proposals, that when a new bidder superseded a present contractor, and had not the stage property requisite for the performance of the contract, he was required to purchase from the old contractor (if the old contractor would sell) his coaches, horses and harness; and, if they could not agree on the price, the property was to be taken at

a fair valuation. He says this was a regulation of the department, and under it he felt safe in making large investments in stock, &c. That by the 18th section of the act of 1845, the Postmaster General was forbidden to require the new contractor to purchase the stock of the old contractor. That this was a breach of his contract, whereby he has lost the sums stated in his account. In this case, on behalf of the United States, we contend:

I. That the 4th section of the act of 1825 contains no such stipulation as the petitioner relies on. It is to be found only in the note thirteen in the advertisement for contracts made in 1841, and in other years. It is no part of the contracts made with the petitioner. It is not incorporated in them. The petitioner neither avers nor proves that he ever under bid any other contractor, or came under the operation of this rule in any form or manner. He is, then, seeking to make a regulation of the department, which never bore on him, the means of recovering damages from the government.

II. This regulation is not a part of the contract, or of any of the contracts, made with him. It is not inserted in those contracts, and cannot, by any rule of interpretation, be made part of them.

Let us see what is the true character of this regulation:

1st. It requires every under bidder who has not the requisite stage stock to purchase or take at valuation the coaches, &c., of the contractor he under bids.

2d. If the old contractor continues to run on the route, then the under bidder is not required to take his property.

3d. If the under bidder refuses to take the property, then the contract is to be offered to the old contractor; and if he refuses to take it at the under bidder's offer, after then it is to be let unconditionally to the under bidder.

4th. If the under bidder offer to take the stock, the old contractor may refuse to sell it.

From this statement of the terms of the regulation, it is clear they are conditions imposed on competing bidders, and not part of the contract entered into between the department and the contractors; for it is not to be imagined that the government, by its regulation, would contract with a contractor to insure him a purchaser of his property, without requiring him to sell the same. There is such a want of mutuality as could not enter into the contract. The department does not, by this arrangement, propose to take the property itself, or to make itself responsible in damages to the old contractor for the conduct of the under bidder; but it imposes these complicated terms on the under bidder as prerequisites to obtaining the contract, and the only penalty for non-compliance is, he shall not have the contract. Clearly, the government has never stipulated with this or any other contractor that it would impose any such restrictions on competing bidders, nor has it in any way stipulated it would be responsible if the under bidder would not take the property of the old contractor.

III. This is a claim on the government for damages because the new contractors were not required to buy the property of the old contractors. It is an effort to charge the government with damages, not

for property used and received by it, but because it would not compel a third person to take the property of the plaintiff; no such promise has been made expressly—no such promise can be implied without an adequate consideration, and no such consideration has either been averred or proved.

IV. The law of 1845 was passed on proper and just considerations, and by its provision a new mode of contracting is introduced.

See letter of Postmaster Johnson, Senate Doc., page —.

The policy of the regulation in question is doubtful. It was designed doubtless by the department to protect the government from the losses incurred by incompetent men thrusting themselves into contracts without means to execute them. The practical effect was perhaps to create a monopoly of contracts in the hands of the old contractors; such a result could not have been designed, and was of itself sufficient to have produced the rescision of the rule. Clearly, when Congress was about to introduce cheap postage, and with it a cheap system of contracts, this monopoly could not remove the inhibition to impose such restrictions on competition illegal. If loss was sustained by the old contractors, it was *damnum absque injuriâ*.

V. But if in proper cases this thirteenth note was part of the contract, the plaintiff has not shown that he is entitled to its benefit; for he does not show—

1st. That he got his contracts by under bidding other contractors, and was compelled to take their property.

2d. He does not show that the competing bidders had not themselves the property requisite to execute their contracts.

3d. He does not show that he did not run opposition to them.

4th. He does not show that he would have taken the contracts at the bids of his competitors if they would not have purchased his property.

VI. On the face of the accounts and evidence, the plaintiff's claim is an exaggerated and inflamed estimate, and therefore unjust to the government.

The regulation requires the under bidder to take from the old contractor, at a fair price, his coaches, teams, and harness. The account states one hundred and eighty horses at \$150 each, and makes the loss, by failure to compel the new contractor to take them, one hundred and twenty dollars on each horse. Horses are things valuable for general purposes. If these horses were worth for other purposes no more than \$30 a head, it is absurd to say they were worth \$150 for stage purposes; and the conclusion that the government should pay petitioner \$120 per head for not compelling the new contractor to take these horses is manifestly illogical and unjust. If, under the regulation, the new contractor could have been compelled to take them, it must clearly have been at their value when he took them. The plaintiff has not proved what he did with these horses. But if, on the 1st of July, 1845, they were worth \$150 each for the arduous service of staging, they must have been worth more than \$30 in the market for other purposes.

The same course of reasoning shows the injustice of claim for loss

on twenty coaches and forty sets of harness. The charge for two sleighs, twenty wagons, coach shops, blacksmith shops, and harness shops, are for things not in the regulations, and their only effect on this case is to manifest a desire to make an enormous bill against the government.

D. RATCLIFFE,
Assistant Solicitor of Court of Claims.

IN THE COURT OF CLAIMS.

THOMAS C. NYE *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner alleges that he was a contractor for carrying the mails of the United States prior to the year 1837.

On the 31st day of May, A. D. 1837, the petitioner and others entered into a contract with the United States to carry the mail from Utica to Ithaca, at the rate of \$1,605 for every quarter of a year during the continuance of the contract; the contract to commence on the 1st day of July, A. D., 1837, and continue in force till the 30th day of June, A. D. 1841.—See “Exhibit I.”

On the same 31st day of May, A. D. 1837, the petitioner and others entered into a contract with the United States to carry the mail from Utica to Binghamton, at the rate of nine hundred and fifty dollars for every quarter of a year during the continuance of the contract; the contract to commence on the first day of July, A. D. 1837, and continue in force until the 30th of June, A. D. 1841.—See “Exhibit H.”

On the same 31st day of May, A. D. 1837, the petitioner entered into a contract with the United States to carry the mail from Cherry Valley to De Ruyter, at the rate of eight hundred and seventy-five dollars for every quarter of a year during the continuance of the contract; the contract to commence on the 1st day of July, A. D. 1837, and continue in force until the 30th day of June, A. D. 1841.—See “Exhibit C.”

On the 22d day of April, A. D. 1841, the petitioner entered into a contract with the United States to carry the mail from Canastota to Hamilton, for and during the term commencing the first day of July, A. D. 1841, and ending with the 30th day of June, A. D. 1845, at the rate of *five hundred dollars a year*.—See “Exhibit E.”

On the 21st day of April, A. D. eighteen hundred and forty-one, the petitioner entered into a contract with the United States to carry the mail from Cherry Valley to De Ruyter, for and during the term commencing on the first day of July, A. D. 1841, and ending with the 30th day of June, A. D. 1845, at the rate of *one thousand five hundred and eleven dollars a year*.—See “Exhibit D.” On the tenth day of August, A. D. 1841, this route was extended to Cooperstown,

at the rate of the additional sum of *two hundred and fifty dollars* a year.—Ibid.

The petitioner alleges that in 1837 he was largely interested in the mail contract of J. M. Sherwood from the city of Albany to Salina, and that in 1842 or 1843, "the contract of said Sherwood from Albany to Salina aforesaid, was transferred to your petitioner, who became thereby, with the assent and approval of the Post Office Department, together with Hiram Lewis, a contractor with said department for carrying said mails from Albany to Cherry Valley, and from Cherry Valley to Syracuse." The proof is, that on the seventh day of September, A. D. 1842, the petitioner and Hiram Lewis entered into a contract with the United States to carry the mail from Cherry Valley to Syracuse, for and during the term commencing the first day of October, A. D. 1842, and ending with the 30th day of June, A. D. 1845, at the rate of *four thousand dollars* a year; and that on the 7th day of September, A. D. eighteen hundred and forty-two, the petitioner and Hiram Lewis entered into a contract with the United States to carry the mail from Albany to Cherry Valley for the same term, at the rate of *twenty-seven hundred dollars* a year.—(See "Exhibit G" and "Exhibit F.") There is no evidence amongst the papers on file to connect these last two contracts with any contract with J. M. Sherwood, or to show that the Post Office Department ever made any contract with him.

The petitioner alleges that, under his contracts with the United States, he found it necessary to invest a large amount of capital in horses, post-coaches, &c., and that from the year 1841 up to 1845 he "owned and employed in such service constantly about two hundred horses and a large number of post-coaches." The witnesses, Van Valkenburgh and Hilton, concur in testifying that in 1845 when the petitioner ceased to carry the mail, he had on hand the following property which he used in the transportation of the mail, and which they estimate as follows: 180 horses, at \$150 each; 20 stage-coaches, at \$450 each; 20 stage sleighs, at \$250 each; 20 double stage wagons, at \$250 each; and 40 sets of four-horse harness, at \$50 each—making a total of \$48,000.

The 13th note to the proposals for carrying the mail, from the 1st day of July, A. D. 1841, till the 30th day of June, A. D. 1845, both days inclusive, is as follows: "On coach routes where the present contractor shall be superseded by an underbidder who may not have the stage property requisite for the performance of the contract, he shall purchase from the present contractor such of his coaches, teams, and harness belonging to the route, as shall be needed, and may be suitable for the service, at a fair valuation, and make payment therefor by reasonable instalments, as his pay becomes due, unless the present contractor shall continue to run stages on the route. Should they not agree as to the suitability of the property, the terms of the security, each may choose a person who may appoint a third, and their decision shall be final; or the Postmaster General will name the umpire. Should the underbidder fail to comply, his bid will be offered to the contractor; but should he decline it, the

proposals of the underbidder will be accepted unconditionally. The underbidder should give early notice of his intention to take or not to take the stock, and if the latter, of his reasons; and the present contractor is to determine on the first application, whether he will sell it or not." This note is treated by the petitioner as a regulation of the Post Office Department. The Postmaster General in his annual report of December 1, A. D. 1845, and in his letter to the mail contractors appended to that report, speaks of it as a regulation of his department.—(See 1 vol. Ex. Doc., 1 Sess. 29th Cong., pp. 852, 876.) The present Postmaster General in his letter of the 29th day of January, A. D. 1857, says: "It was a regulation or *requirement* of the department." And the present Second Assistant Postmaster General in his letter of the 8th day of July, A. D. 1856, speaks of it as a regulation of the department, and says that it is correctly quoted in the petition.

By the act of Congress approved March 3, A. D. 1845, it was provided, "that it shall be the duty of the Postmaster General, in all future lettings of contracts for the transportation of the mail, to let the same in every case to the lowest bidder, tendering sufficient guarantees for faithful performance, without other reference to the mode of such transportation than may be necessary to provide for the due celerity, certainty, and security of such transportation; nor shall any new contractor hereafter be required to purchase out, or take at a valuation, the stock or vehicles of any previous contractor for the same route.—(5 Stat. at L., p. 738, ch. 43, § 18.)

In the month of December, A. D. 1844, the Postmaster General advertised for proposals for carrying the mails on the routes above mentioned for the term of four years from the first day of July, A. D. 1845; and in his advertisements was inserted the 13th note already noticed; but on the 8th day of March, A. D. 1845, he issued a circular in which he called the attention of persons desiring to contract to the provisions of the act of March 3, A. D. 1845, and gave notice that no new contractor would be required to purchase out, or take at a valuation, the stock or vehicles of the previous contractor for the same route.

By a joint resolution of the Senate and House of Representatives, it was provided that the act of March 3, A. D. 1845, above referred to, should go into effect on and after the 1st day of July then next following, and not sooner.—(5 Stat. at L., p. 800.)

The petitioner alleges that in the letting of the mail contracts in the year 1845, on the respective routes and lines on which he was a contractor previous and up to the letting, he was an unsuccessful bidder, and lost all his contracts for transporting the mails thereon; that the new contractors not being required to purchase out, or take at a valuation his stock and vehicles, the whole thereof was left on his hands without any employment or use for the same; that the failure of the Postmaster General to require the new contractors to purchase out, or take at a valuation his stock and vehicles, was a direct violation of his contracts with the United States; and that he has thereby sustained heavy damages.

None of the contractors at the lettings in the spring of 1845, on the routes embraced by the petitioner's contracts, were "old coach contractors."—(See the letter of the Postmaster General to the clerk of this court, dated December 30, A. D. 1856.)

The principal inquiry presented for our consideration in this case is, has the petitioner shown a contract, either express or implied, with the United States, by which they undertook that if he should be succeeded by an underbidder, the latter should be required to purchase his stock and vehicles; or, in other words, that such underbidder should be required to comply with the 13th note?

In determining this question it is necessary to understand the true character of the 13th note, and the purpose for which it was used. It is called, as we have seen, a regulation of the Post Office Department. How and in what sense it was a regulation of that department is shown by the letter of the Postmaster General to the mail contractors appended to his annual report of December 1, A. D. 1845, and in the letter of the Postmaster General of the 29th day of January, A. D. 1857. In the former he says: "The condition requiring a new contractor to take the property of a prior one was a regulation of the department attached to the advertisement, and not exacted by any law, and can have no bearing upon any other contract than the one made under it." In the latter he says: "I beg leave to say that the 'regulation' 13, therein quoted was, as stated by the petitioner, one of the 'notes' attached to the advertisement inviting proposals for carrying the mail in New York from 1841 to 1845, and had been in use for many years in all the advertisements for mail letting throughout the Union, until the passage of the act of Congress of March 3, 1845." From these statements we infer that whenever advertisements were issued inviting proposals for carrying the mail on coach routes, the 13th note, by order of the department, constituted a part of them; and that it was not designed to bear on any other contracts than those made under such advertisements. There was no act of Congress, and no regulation of the department requiring the 13th note to be inserted in *all* such advertisements. When the period at which advertisements were to be issued arrived, whether it should be inserted in them or not was a matter resting entirely in the discretion of the Postmaster General for the time being. It was called a regulation merely because it was the creature of the department. A compliance with it by an underbidder was imposed as a condition precedent to the acceptance by the United States of his proposals. That was its whole object; and when that object was accomplished the 13th note had performed its office in reference to the particular contract to which it applied.

Such is our understanding of the true character and purpose of the 13th note. So considering it, it seems to us that in its very nature it was applicable only to the proposals of underbidders, made under the particular advertisements to which it was annexed; and that the mere fact that it had been over and again, at many successive lettings, inserted in the advertisements and made a condition precedent to the acceptance of the proposals of underbidders, created no

obligation whatever on the part of the United States to use it in subsequent advertisements.

Each particular contract for carrying the mail is, under the acts of Congress, a special contract, and the mutual rights and obligations of the parties are to be found in the contract itself. The mere fact that the advertisements inviting proposals for such contracts have for a series of lettings contained a particular provision, cannot constitute a usage. Each particular insertion of the provision was made, not because it had been made before, but because in the opinion of the head of the department the public interests required it; and the insertion of one year had no more influence on the insertion of the succeeding year than the latter had upon the former. Each insertion was a separate and independent transaction in itself—a special regulation for that particular occasion—and was unaffected by anything of the same kind which preceded or followed it. The use of it, therefore, no matter how often, created no obligation to continue its use. It was as new on each succeeding occasion on which it was used as if it had never been used before. The reason of this is obvious. The whole business connected with each contract for carrying the mail was matter of special arrangement, and all its details were expressly, item by item, declared and agreed upon; and each contract was a separate, distinct, and independent transaction. If a special contract be made to continue for a limited period, and it be renewed again and again, no matter how often—if on each occasion the same formalities are observed as at the beginning and a special contract is made—there would be no more obligation to make it the hundredth time, after it had been made ninety and nine times, than there was to make it the second time, after it had been made once. The mere repetition of a special contract no matter how often can not create a usage.

We do not mean to say that a special contract cannot be affected by usage. The language of such a contract may be interpreted by usage; and *incidents* may be annexed to it by usage. Usage is admissible to show the meaning of the words “cotton in bales,” (Taylor *vs.* Briggs, 2 C. & P., 525;) and a lessee by deed may show that by the custom of the country he is entitled to an away-going crop, though no such right is reserved in the deed.—(Wigglesworth *vs.* Dallison, 1 Doug. R., 201; Dorsey *vs.* Eagle, 7 Harr. & Gill, 321; Stultz *vs.* Dickey, 5 Binn., 285; Carson *vs.* Blaze, 2 *ibid.*, 487; Van Ness *vs.* Pacard, 2 Peters’ R., 137; Hutton *vs.* Warren, 1 Mees. & W., 466.) This is allowed upon the presumption that the parties did not intend to express in writing the whole of the contract, but to make the contract with reference to the usage.—(Hutton *vs.* Warren, 1 Mees. & W., 475; Boorman *vs.* Johnston, 12 Wend. R., 574.) The rule it is said does not add new terms to the contract, but it shows the full extent and meaning of those which are contained in the instrument.—(1 Greenlf. on Ev., § 294.)

And so where negotiable paper is payable with grace, parol evidence of the known and established usage of the bank at which it is payable is admissible to show on what day the grace expired.

(*Renner vs. Bank of Columbia*, 9 Wheat. R., 581.) Evidence of usage is received for the purpose of ascertaining the sense and understanding of parties by contracts made with reference to such usage; for the usage then becomes a part of the contract, and may not improperly be considered the law of the contract; and it rests upon the same principle as the doctrine of the *lex loci*.—Per Thompson, J., in *ibid.*, 588.

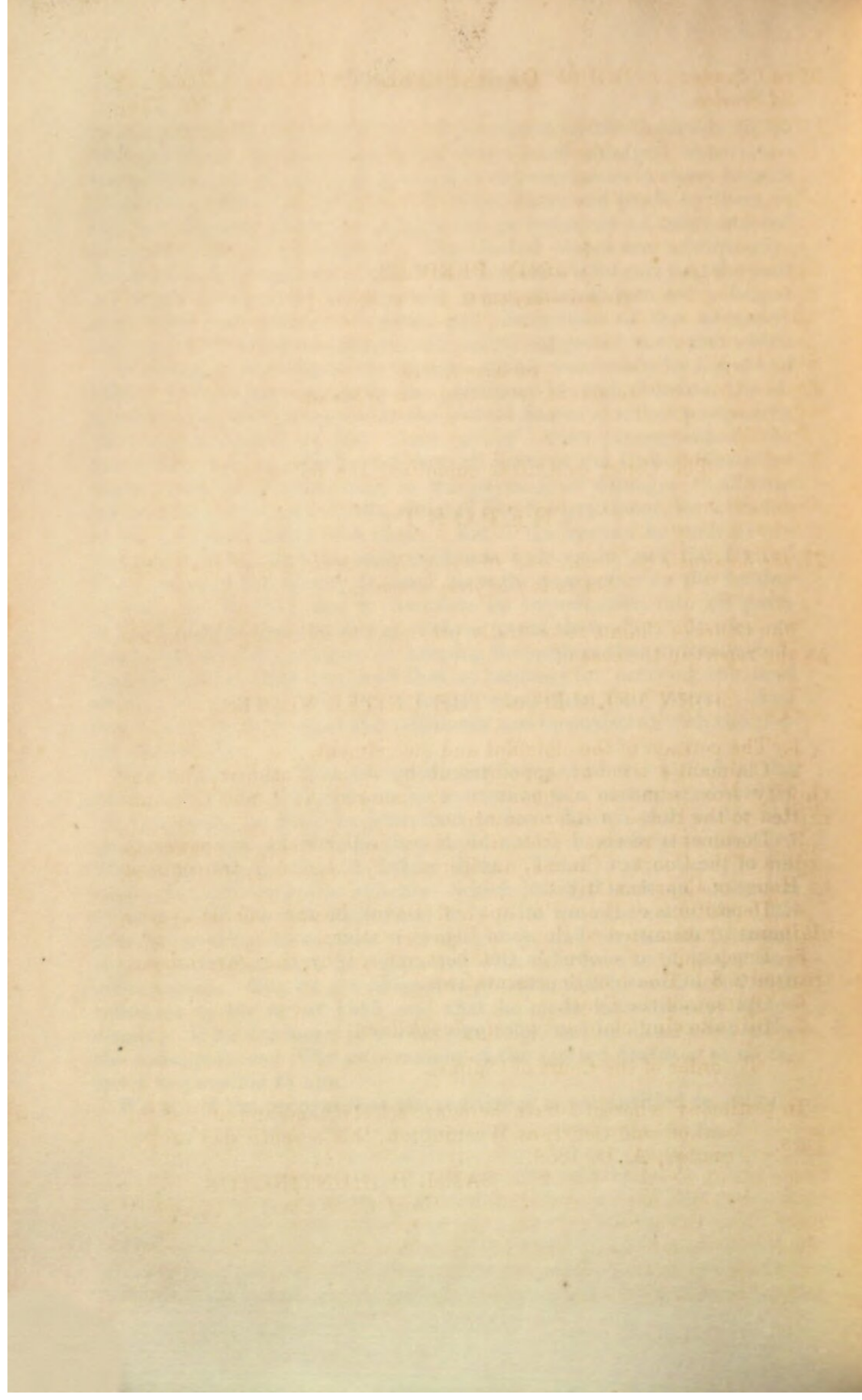
But in all these cases the usage existed independently of the contracts, and was by implication made a part of them, because they were made with reference to it. The contracts did not create the usage, but the usage showed that the contracts so made had the meaning which the usage attached to them. There is nothing of this sort connected with the contracts in question. At some period, when, does not distinctly appear, the Postmaster General invited proposals by advertisements to which the 13th note was appended. This was done again and again till the year 1845. In the meantime the petitioner had become interested as a contractor. It may be that he was an underbidder, and required to comply with the 13th note. Was he so required because the same condition had been imposed on his predecessors for many previous lettings, and it had thereby become a law that such a condition should be imposed, or was it for some other reason? The answer to this question is easy and simple. The reason for imposing this condition was the same in each particular instance. It was because the Postmaster General who had authority to prescribe it, had ordered it, and in ordering it was governed by a due regard to the public interests. No one would contend that after having imposed this condition in the first instance, there was any obligation on the government to impose it a second time. Hence the first contractor on whom it was imposed had no reason to regard its imposition upon his successor as a certainty. There can be no ground to insist that he had. Hence, if the petitioner were such first contractor, his claim, it is obvious, would be groundless. But why? Because a single instance would not establish a usage? But if a single instance would not, how many would? It would, indeed, be difficult to distinguish between the rights of the first underbidder on whom this condition was imposed, and those of the petitioner whose contracts were made many years afterwards. The one had just as much reason to expect that the 13th note would be imposed on his successor as the other; neither had a right to require it. Both of them stood upon the same footing, enjoying precisely the same rights, neither having any advantage over the other. And this is as it should be. But why? Because they both made precisely the same kind of contracts, in reference to the same subject matter, and under precisely similar circumstances.

These views are strengthened if not rendered conclusive, by that provision of the act of 1825, which requires that no contract for carrying the mail shall be entered into for a longer term than four years. 4 Stat. at L., p. 105, ch. 64, § 10. The policy of this provision is manifest. Under its operation, each contract for carrying the mail must necessarily be a separate transaction and confined within the limits of four years.

It was a measure suggested by a due regard to the interests to be affected by it. It was easy to see that a more enlarged experience would from time to time suggest various improvements in every branch of the Post Office Department. To meet these and profit by them, it was but ordinary prudence to keep the government as untrammelled as practicable in all respects. The United States are, accordingly, divided into four sections, in one of which contracts for carrying the mail are made every year, no contract being entered into for a longer term than four years. A more apt illustration of the necessity and propriety of such a policy could not be suggested than that which is furnished by the important changes which were made by the act of 1845. If the claim set up by the petitioner be well founded, the alternative was then presented to the United States of either postponing the commencement of the "new policy" then "inaugurated" for four years, and its introduction into all parts of the United States for seven years, or of submitting to the payment of damages to all contractors for carrying the mails, situated like the petitioner, for a breach of the contracts made with them. But if the system be such as we suppose it to be, then no such contracts were made, and the United States were at full liberty to enter upon the new policy on the 1st day of July, A. D. 1845, and to complete its introduction into all parts of the Union at the expiration of three years thereafter. It was, we think, for the very purpose of keeping themselves thus untrammelled, that the act of 1825 required that no contract for carrying the mail should be entered into for a longer term than four years. And hence, the pretensions of the petitioner are inconsistent with the policy of that act.

So far, therefore, from the petitioner being at liberty to look to the imposition of the 13th note on his successors as a matter embraced by his contracts, he must be presumed to have known that under the operation of the act of 1825, they could not be so made as to interfere with those which were to follow them. There was nothing in his contracts—not a word or syllable—which justified such an extension of them. He was not authorized to look to the renewal of the 13th note as anything more than a contingency, and we cannot presume that as a prudent man he contracted with reference to it under any other aspect. But we are obliged to presume that he contracted with reference to the act of 1825, and that he made his estimates accordingly. If he did more, it was his own folly, and he alone must suffer the consequences. The government of the United States is in no respect responsible to him.

We are of the opinion that the petitioner is not entitled to relief.



JOHN PEEBLES.

[To accompany bill H. R. C. C. No. 88.]

DECEMBER 7, 1858.

JANUARY 21, 1859.—Ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of

JOHN PEEBLES *vs.* THE UNITED STATES.

1. The petition of the claimant and amendment.
2. Claimant's account, appointment by J. A. Cuthbert, and authority from same to claimant to act, marked A, B, and C, transmitted to the House of Representatives.
3. Documents received from the Navy Department, in answer to orders of the Court of Claims, numbered 1, 2, 3, 4, 5, 6, 7, transmitted to House of Representatives.
4. Depositions of Elam Phillips and David Boston, offered by the claimant, transmitted to House of Representatives.
5. Depositions of John A. Cuthbert, offered by the government, transmitted to House of Representatives.
6. Opinion of the Court.
7. Bill allowing claimant *twenty-five dollars*.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the
[L. S.] seal of said Court, at Washington, this seventh day of December, A. D. 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

JOHN PEEBLES *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States :

The petition of John Peebles, a citizen of the State of Alabama, respectfully represents that he is by profession a surveyor, in which business he has had many years experience. That on or about the 26th December, 1853, Mr. John A. Cuthbert made application to your petitioner to execute certain surveying for the government of the United States under his direction. Said Cuthbert represented himself as the agent of the United States, appointed by the Navy Department for the purpose of protecting the public lands of the government and the timber growing thereon, from waste and depredation, and that his agency was confined to the southern district of Alabama. Said Cuthbert further stated that trespassers were constantly committing depredations upon the public lands by cutting down and removing the timber ; that he was instituting prosecutions against such trespassers in all cases where he could ascertain them ; that, in order to perfect the proof against the defendants on the trials in court, it was necessary to employ surveyors to go upon the lands and run out the lines of the precise tracts trespassed upon, so as to be able to testify to the same in court. Said Cuthbert then proposed to employ your petitioner in this service, and believing he was invested with full authority for that purpose, your petitioner concluded a contract with him upon the terms following ; the same not being in writing, but verbal.

Said Cuthbert agreed to pay your petitioner the sum of one hundred dollars per month, without stating any definite time for which petitioner was to be employed, and also agreed to reimburse petitioner all his necessary travelling expenses while so employed, as well as the expense of chain carriers, axe men and choppers, who might be employed by him in the surveys, of all which your petitioner was to keep, and did keep, an accurate account. In consideration of which payments to be made by said Cuthbert, your petitioner agreed to give his entire time to said service, to run the lines of tracts trespassed upon, in any part of said district, when required by said Cuthbert, or under his authority—to keep memoranda of the same—to testify to the same on the trials in court—and to make settlements with the depredators according to his best judgment, and upon terms and conditions which were drawn up and furnished your petitioner in writing by said Cuthbert.

Your petitioner further states that immediately after concluding said contract he proceeded to the discharge of his duties, and was in the employ of said Cuthbert for the period of seven months ; that he devoted his whole time to said service with strict fidelity and in good faith ; that at the two next succeeding terms of the circuit court of the United States he gave testimony both before the court and grand jury in sundry prosecutions for depredations upon the public lands. And during the whole of said service petitioner believes he gave entire satisfaction to said Cuthbert, as he never heard the least complaint of

the manner in which he discharged his duties. At the expiration of the said term of seven months, your petitioner presented his account to said Cuthbert for services rendered in pursuance of said contract, which account accompanies this petition, signed by petitioner, and marked A, and is for the sum of \$845 25. Said Cuthbert refused to pay said account, saying that he had no funds; and your petitioner then refused to work any longer under said contract.

Your petitioner is unable to say under what act of Congress the Navy Department, or Mr. Cuthbert, acting under its authority, employed him to perform said services. He supposed there was no doubt of said Cuthbert's authority. He was recognized here as the timber agent of the government. The prosecutions instituted by him against depredators were numerous, and no defences, so far as your petitioner is informed, were set up on the ground of a want of authority, either of law or from the Navy Department, on the part of said Cuthbert. Your petitioner received from said Cuthbert a commission, which accompanies this petition, and is dated January 21, 1854, and is marked B.

Your petitioner would further state that he is informed and believes that said Cuthbert's contracts with other surveyors, for like services, have been recognised by the Navy Department and the head of the Bureau of Yards and Docks, as of binding obligation upon the government. He therefore prays that the heads of those offices may be subpoenaed to testify before your honorable Court to that point.

Your petitioner further prays that subpoenas may issue to take the testimony of Elam Phillips, C. K. Godbold, and David Barton, citizens of the county of Mobile, and State of Alabama, by whom all the facts necessary to support the claim of your petitioner can be fully and satisfactorily proved, to the end that judgment may be rendered in favor of your petitioner for the amount of his aforesaid account.

IN THE UNITED STATES COURT OF CLAIMS.

JOHN PEEBLES *vs.* THE UNITED STATES.

To the honorable Court of Claims:

The petitioner, by his attorney, respectfully represents that leave having been granted by this honorable court to amend the petition of the claimant (John Peebles,) so as to allege the proceedings had in the case in the Navy Department—the same having been omitted in the original petition—he now states that application for payment of the claim of said Peebles, which is the matter in controversy in this case, was made to the Chief of the Bureau of Docks and Yards of said Navy Department, and that it was refused, on the ground that the service, as he alleges, was not authorized, and the account was not certified to be correct by Mr. Cuthbert, the agent of the department; all of which will appear on reference to the letters of Commodore Joseph Smith, Chief of the Bureau of Yards and Docks of the Navy

Department, dated the 6th and 16th of March, 1858, and herewith presented to the Court, and which it is requested may be received and filed in the case.

All of which is respectfully submitted, by

J. F. POLK,
Attorney for John Peebles.

A.

The United States Dr., by John A. Cuthbert, timber agent, southern district of Alabama, by contract with John Peebles, on December 27, 1853, to August 11, 1854.

For seven months' services as a surveyor, (and his expenses to be paid him,) at one hundred dollars per month..... \$700 00

For the contingent account for expenses in travelling, chain bearers, and choppers—

December 27, 1853. For one days' travel, and ferry boat, to Mobile, by order of a subpoena from United States court...	3 70
December 30, 1853. For cash paid Mobile ferry boat to Baldwin county, on a survey and examination of lands.....	1 00
December 30, 1853. Return to Mobile to report ferry boat, and board... ..	4 00
January 10, 1854. Paid steamer Fashion, passage to Oven Bluff, Clark county, on a survey, United States against Dubose, for a trespass.....	3 00
January 10, 1854. Paid steamer Fashion, return to Mobile.	3 00
January 22, 1854. Paid steamer Cuba, passage to Saint Stephen's land office, after maps, &c., for use of department	4 00
January 22, 1854. Paid board at Saint Stephen's.....	5 00
February 2, 1854. Paid steamer Bellgates, passage from Saint Stephen's to Mobile	3 00
February 3, 1854. Paid for one ream coarse writing paper, in Mobile.....	1 00
Paid ferry boat of Mobile, to Baldwin county.....	1 00
Paid, all night at Stockton, self and horse.....	1 25
Paid at Gainstown ferry, Alabama river, self and horse.....	25
Paid expenses at town of Jackson, Clark county, while examining lands in that neighborhood.....	3 00
Paid, all night at Coxe's, \$1, all night at Wood's Bluff, \$1	2 00
Paid board at Kelley's, Clark county, examining neighborhood.....	5 00
Paid, en route to Demopolis land office, at Glover's all night	1 25
Paid board at Demopolis, self and horse, procuring township maps, eight days.....	16 00
Paid, return from Demopolis, all night at Bradford.....	1 25
Paid, all night at Choctaw Corner, Mr. Taylor's.....	1 00
Paid, all night at Sugsville, Clark county.....	1 25

Paid at Gainstown ferry, Alabama river.....	\$0 25
Paid, all night at Stockton, self and horse.....	1 25
Paid ferry boat to Mobile.....	1 00
Paid board at Mobile, attending United States Court.....	4 00
Paid steamer passage to junction of Beckbee and Alabama rivers, on survey, United States vs. John Stalls*....	3 00
Paid board to Webb, while on survey and examination.....	5 00
Paid George Mashow, chain bearer, \$1 50 per day, 5 days..	7 50
Paid Samuel Hutchinson, chain bearer, 1 day	1 00
Paid John Averith, chain bearer, \$1 50 per day, 7 days.....	10 50
Paid Reuben McDonald, chopper, \$1 50 per day, 7 days....	10 50
Paid to return to Mobile by land, all night at Stockton.....	1 00
Paid ferry boat to Mobile to report, and return.....	2 00
Paid ferry boat, self and horse, to Mobile.....	2 50
Paid board in Mobile, while writing in agent's office.....	2 25
Paid board for horse, Mobile, same time.....	3 00

(Leave Mobile for St. Stephen's land office.)

Paid ferry at Chickasawboge creek, 10 cents; Cedar creek, 10 cents.....	20
Paid board, self and horse, at St. Stephen's.....	10 00
Paid return ferry, at Cedar creek, 10 cents; Chickasawboge, 10 cents.....	20
Paid, all night at Slade.....	1 00
Paid board at Mobile.....	1 25
Paid passage on railroad car to Citronell.....	90
Paid, return by the same, to Mobile.....	90
Paid board for horse, Mobile.....	10 00

Amount..... 845 25

JOHN PEEBLES.

The United States to Reuben McDonald, Dr.

May 13, 1854. For the hire of one hand as a chopper for a survey by John Peebles, surveyor in the case of the United States timber agent vs. John Stalls, for a trespass, at the rate of one dollar and fifty cents per day, for seven days..... \$10 50

Received of John Peebles, surveyor, the above account, ten dollars and fifty cents, in full.

R. McDONALD.

* This case was a bad swamp.

The United States to John Avis, Dr.

May 13, 1854. For hire to bear the chain for a survey by John Peebles, surveyor, in the case of the United States timber agent *vs.* John Stalls, for a trespass at the rate of one dollar and fifty cents per day for seven days..... \$10 50
 Received of John Peebles, surveyor, the above account, ten dollars and fifty cents, in full.

W. J. AVIS.

B.

UNITED STATES OF AMERICA, }
Southern District of Alabama. }

By virtue of authority in me vested, I hereby designate and appoint you to ascertain the boundaries of the lands belonging to the government of the United States, appurtenant to the land office at St. Stephens, when ascertainment of lines, by surveys, shall be necessary in the operations of my agency.

JOHN A. CUTHBERT,
U. S. Timber Agent, South. Dist. Ala.

To JOHN PEEPLES, Esq.
 JANUARY 21, 1854.

C.

UNITED STATES OF AMERICA, }
Southern District of Alabama. }

Know all men by these presents, that for the advancement of the public interests in the protection of government timber, and the convenience of parties wishing to make a lawful settlement for timber which they have cut on, or taken from lands belonging to the government of the United States, I hereby authorize and empower John Peebles to make settlements for timber of any and every kind, cut on or taken from said lands, according to the following regulations, viz :

John Peebles must determine, according to the best of his information and judgment, the number of trees cut on, or taken from government lands, by the trespasser, and he must in like manner ascertain the value of such trees, in the neighborhood.

The trespasser must pay three times the value of the trees cut or taken by him, ascertained as above.

In the receipt and discharge given to the trespasser, John Peebles must specify the number and kind of trees, and the land on which they were cut, or from which they were taken.

JOHN A. CUTHBERT,
United States Timber Agent.

AUGUST 16, 1854.

No. 1.

BUREAU OF YARDS AND DOCKS,
December 13, 1856.

SIR: The bureau has the honor to acknowledge the receipt of the order of the Court of Claims, of date of the 10th instant, for a copy of the commission to John A. Cuthbert, late timber agent in Alabama, and for any other documents or evidence in relation to the claim of John Peebles, now pending in said court.

Upon examination of the records of this bureau, it is found that Peebles' case is referred to in Mr. Cuthbert's letter of November 28, 1854, and again in the receipt given by Peebles to Cuthbert, 24th of June, 1854, for the sum of twenty-five dollars, for surveying; copies of which are herewith enclosed. A copy of the commission or instructions to Mr. Cuthbert, dated July 27, 1853, is also forwarded.

The order of the Court is herewith returned.

I have the honor to be, very respectfully, yours, &c.,

JOS. SMITH.

Hon. J. C. DOBBIN,
Secretary of the Navy.

BUREAU OF YARDS AND DOCKS,
July 27, 1853.

SIR: The Secretary of the Navy having decided to consolidate into one the timber agencies of Alabama, and having appointed you the timber agent for that State, I have been directed to forward for your government the following instructions:

It will be your duty to preserve from waste, destruction, removal, and from every species of depredation, all the timber and wood growing, standing, or being upon the public lands in the State; but more especially the live oak, red cedar, and long leaf yellow pine, suitable and valuable for naval purposes.

For any information you may require to enable you to designate public from private lands, you will apply to the surveyor general of the State, and to the different land offices in your district. If necessary, you will seek the legal advice of either of the United States district attorneys within your reach; and you will invoke the assistance, not only of the civil authority, but so far as it can be lawfully given, likewise that of the army and the navy, for the successful accomplishment of the important trust committed to you.

The department relies upon your unremitting exertions, and a prompt resort to all proper means within your power to the effectual discharge of this duty. It is also required by the department that you shall engage in no business whatever which shall interfere with or prevent a faithful discharge of your duties as timber agent.

Your compensation will be at the rate of fifteen hundred dollars; and it is to be distinctly understood that the per annum compensation of fifteen hundred dollars is the only allowance that will be made under any circumstances whatever, except for horse and boat hire,

surveying, the procuring of township maps, and other *similar* expenses inseparably connected with an efficient performance of your public duties.

For all expenses incurred by you on public account, you will take receipts in triplicate, and transmit a statement thereof quarterly to the Fourth Auditor of the Treasury for settlement; and in all your expenses it is expected that the most rigid economy will be observed. Your predecessors, Messrs. Hardy Wilkins, of Montgomery, and Nathaniel Davis, of Limestone county, will be directed to turn over to you all the public property in their possession having reference to your agency. For the property thus received you will exchange duplicate receipts, and forward copies thereof for file in this bureau.

You will report monthly to the bureau, and oftener if necessary, statements in detail, making the department intimately acquainted with all your proceedings.

Respectfully, your obedient servant,

JOS. SMITH.

JOHN A. CUTHBERT, Esq.,

U. S. timber agent, Mobile, Ala.

Extract from letter of John A. Cuthbert, United States timber agent, southern district of Alabama, dated Novembr 28, 1854, so far as it relates to the case of John Peebles.

"I had surveys completed for twelve of my cases in the court at Mobile, and for all of my cases but one, in the court at Montgomery.

"Mr. John Peebles had a high reputation as an industrious and accurate surveyor; and early in the summer I had engaged him to make the surveys for all the residue of my cases. In August, I think about the middle of the month, he entered into a direct and absolute engagement with me to make the surveys for all these cases; to commence the work immediately, and not to stop until the whole was completed. This engagement was made immediately after I had rejected his fictitious account against the government. It was a good job for him. He evinced an earnest wish to get it, and I believed he would execute his contract with me. In October I again directed my attention to the surveys, and to my very great surprise, I found that Mr. Peebles had not commenced them. I then went on a route for the very purpose of engaging another surveyor, and I endeavored to find Mr. A. B. W. Kennedy, whom I believe to be a good surveyor. He had some surveys on hand at the time, and I could not procure his services immediately, but I was informed that he wished to engage with me, and he promised to meet me in Mobile." * * * * *

"I afterwards saw Mr. Kennedy and engaged his services, and I have no doubt that he is now making the surveys."

"Just before the interview with Mr. Requier, I had been informed that Bradford, a surveyor, whose testimony was important to me, had gone to Texas; and a friend had told me that Peebles was bribed to

defeat me, and it was to these matters that I alluded in my remark to Mr. Requier. On further reflection I do not believe that Peebles was bribed, but he found as good employment from private persons, and I believe that he left me in resentment."

Received of Judge J. A. Cuthbert, at Mobile, this 24th day of June, 1854, twenty-five dollars on account of expenses in surveying the public lands on account of trespasses.

JOHN PEEBLES,
Surveyor, southern district Alabama.

No. 2.

BUREAU OF YARDS AND DOCKS,
January 20, 1857.

SIR: The bureau has the honor to acknowledge the receipt of the order of the Court of Claims, dated the 14th instant, in relation to the case of John Peebles *vs.* The United States, asking for information in regard to the regulations of the Navy Department for the appointment of timber agents, with their powers relating to the preservation of live oak and other timber, for naval purposes, and requesting copies thereof, as well as for any other information tending to elucidate the claim of said Peebles.

The 3d section of the act of Congress of March 3, 1827, authorizes the President of the United States to take proper measures to protect the live oak timber suitable for naval purposes, growing upon the public lands. Under this authority the Secretary of the Navy has from time to time, as the public interests required, appointed timber agents in the States of Florida, Alabama, Mississippi, and Louisiana, whose special duty it is to take care of the public interests in this regard.

Mr. John A. Cuthbert was appointed timber agent for the southern district of Alabama on the 27th July, 1853, and a copy of his commission or instructions was sent to you (in answer to an order of the Court of Claims dated December 10, 1856) on the 13th of December last; also copies of the correspondence of Cuthbert with the bureau relating to the claim of the said John Peebles for surveying.

The order of the Court of Claims is herewith returned.

I have the honor to be, very respectfully, your obedient servant,
JOS. SMITH.

Hon. J. C. DOBBIN, *Secretary of the Navy.*

No. 3.

BUREAU OF YARDS AND DOCKS,
October 13, 1857.

SIR: I have the honor to acknowledge the reference of the order of the Court of Claims of date the 12th instant, requesting evidence to be furnished in the suit of John Peebles *vs.* The United States;

and, in reply, state that the timber agents under the Navy Department for the State of Alabama were not authorized to employ surveyors, except when specially directed to do so by this bureau, and that no general or special authority or directions were given to Mr. Cuthbert to employ Mr. Peebles.

Surveyors have been paid by the Navy Department, when properly and specially employed by its agents, at the usual rates allowed in the State for such duty, on bills specifying the lands surveyed which are certified to be correct by the agents, and approved by this bureau.

The bureau would respectfully state that there is no other evidence in the records of the department relating to this case than that heretofore communicated in letters to the Secretary of the Navy, dated respectively December 13, 1856, January 20, 1857, and the 29th of July last.

Enclosed herewith is a copy of the bureau's letter of instructions to Mr. John A. Cuthbert, late timber agent in Alabama, dated July 27, 1853.

The papers are herewith returned.

I have the honor to be, very respectfully, your obedient servant,
JOS. SMITH.

Hon. ISAAC TOUCEY,
Secretary of the Navy.

BUREAU OF YARDS AND DOCKS, *July 27, 1853.*

SIR: The Secretary of the Navy having decided to consolidate into one the timber agencies of Alabama, and having appointed you the timber agent for that State, I have been directed to forward for your government the following instructions:

It will be your duty to preserve from waste, destruction, removal, and from every species of depredation, all the timber and wood growing, standing or being upon the public lands in the State, but more especially the live oak, red cedar, and long leafed yellow pine, suitable and valuable for naval purposes. For any information you may require to enable you to designate public from private lands, you will apply to the surveyor general of the State and to the different land offices in your district. If necessary, you will seek the legal advice of either of the United States district attorneys within your reach, and will invoke the assistance not only of the civil authority, but so far as it can be lawfully given, likewise that of the army and navy, for the successful accomplishment of the important trust committed to you.

The department relies upon your unremitting exertions, and a prompt resort to all proper means within your power to the effectual discharge of this duty. It is also required by the department that you shall engage in no business whatever which shall interfere with or prevent a faithful discharge of your duties as timber agent.

Your compensation will be at the rate of fifteen hundred dollars, and it is to be distinctly understood that the per annum compensation of fifteen hundred dollars is the only allowance that will be made under any circumstances whatever, except for horse and boat hire, surveying,

the procuring of township maps, and other *similar* expenses inseparably connected with an efficient performance of your public duties.

For all expenses incurred by you on public account, you will take receipts in duplicate, and transmit a statement thereof quarterly to the Fourth Auditor of the Treasury for settlement; and in all your expenses it is expected that the most rigid economy will be observed. Your predecessors, Messrs. Hardy Wilkins, of Montgomery, and Nathaniel Davis, of Limestone county, will be directed to turn over all the public property in their possession having reference to your agency. For the property thus received you will exchange duplicate receipts and forward copies thereof for file in this bureau.

You will report monthly to the bureau, and oftener, if necessary, statements in detail, making the department intimately acquainted with all your proceedings.

Respectfully, your obedient servant,

JCS. SMITH.

JOHN A. CUTHBERT, Esq.,
U. S. Timber Agent, Mobile, Alabama.

No. 4.

BUREAU OF YARDS AND DOCKS,
October 23, 1857.

SIR: I have the honor to acknowledge the reference of the order of the Court of Claims, dated the 20th instant, in relation to the case of John Peebles *vs.* The United States, and in reply to the first interrogatory state, that the records of this bureau do not show that any special directions issued to Mr. John A. Cuthbert, late timber agent in Alabama, to employ either the Messrs. Bradford or A. R. W. Kennedy as surveyors.

But it does appear that these parties were employed by Mr. Cuthbert to make surveys and examinations of certain sections of land, which they did; that their accounts for said service were presented by said Cuthbert, duly certified, for payment, and that the bureau approved them.

2. It has necessarily been the practice of the department to confide to the timber agent for Alabama, and to the agents for other States, the making of contracts with surveyors when their services are required by the public interests.

3. It has been the general practice of the department to allow the accounts of surveyors when properly vouched and certified by the agent. In some cases of palpable overcharge, the bureau has suspended the accounts of surveyors for want of authority or for explanation.

I know of no other evidence in this bureau tending to elucidate the claim of John Peebles *vs.* The United States which has not previously

been communicated in letters dated December 13, 1856, January 20, July 29, and October 13, 1857.

The order of the Court of Claims is herewith returned.

I have the honor to be, very respectfully, your obedient servant,
JOS. SMITH.

Hon. ISAAC TOUCEY,
Secretary of the Navy.

No. 5.

BUREAU OF YARDS AND DOCKS,
November 18, 1857.

SIR: The bureau has the honor to acknowledge the reference of the order of the Court of Claims, dated the 17th instant, in the case of John Peebles *vs.* The United States, requesting certain copies of correspondence, and in reply states that a copy of the bureau's letter to the Secretary of the Navy, dated August 2, 1854, in respect to the Messrs. Bradford's account is herewith enclosed.

In reference to the second inquiry the records do not show that the bureau made any reply to Mr. Cuthbert's letter of the 14th of March, 1857, in which objections and reasons are stated why Peebles' claim was not well founded. But it does appear that said letter was forwarded to the Assistant Solicitor of the Court of Claims, Mr. Ratcliffe, a copy of which is herewith transmitted.

The order of the Court is herewith returned.

I have the honor to be, very respectfully, your obedient servant,
JOS. SMITH.

Hon. ISAAC TOUCEY,
Secretary of the Navy.

No. 6.

WASHINGTON, *March* 14, 1857.

DEAR SIR: Your communication of the 5th instant has been received. I have endeavored to recall to mind the material facts in relation to the claim of John Peebles against the United States, and I feel certain that my recollection of them is clear and reliable. The claim is fraudulent in every part.

I engaged the Bradfords' to survey lands in the county of Washington, in preparation for prosecutions that had been commenced. I had been in the county of Clarke, and had there seen a considerable number of ship spars hewn, but not yet hauled away, and I had information that persons not known to me had been getting spars in another part of the same county. I engaged Peebles to go into Clarke county, to ascertain the government land on which spars had been cut, and to survey them.

I expected him to report what work he might do in a shape in which I could act on it, and to pay him the customary price for what work he might do. I did not enter into any contract to employ him by the month, or to pay his expenses. In all cases when I employed surveyors, I found it expedient to give them written authority, in order to prevent their being interrupted by trespassers who might wish to prevent the surveys.

Mr. Peebles reported to me one case of trespass, where lightwood had been cut on the public land. The lightwood was seized under my authority, and a prosecution was commenced; and Mr. Peebles was summoned as a witness, and failed to attend. This was the only case of trespass of which he ever gave me information, and he was never summoned as a witness in any other case by my direction or within my knowledge. I remember well that during the time covered by his account, I inquired of David Barton whether he knew where Mr. Peebles was, for I was surprised that he gave me no information about spars; and Barton told me, in reply, that Peebles was in his employment, hunting trespasses for him (Barton) to return as informer.

In the middle or latter part of April, 1854, a raft of cypress logs was brought down Mobile river, which I was informed had been taken from government land. I engaged Peebles to go to the place and ascertain, by making a survey, whether the land from which they had been taken belonged to the government. I have no doubt that Peebles made this survey, and the one above mentioned. He never reported any other survey to me. I have never heard of his making any other survey for the government. He never gave me any information in relation to trespasses, except in the two cases above mentioned.

He asked me for twenty-five dollars, saying that he wanted money to pay chain carriers, not presenting any account to me. I paid him the twenty-five dollars, and he gave me a receipt, the language of which seems to favor his claim. I have no recollection why the receipt was written in this form; but I conjecture that it was so written at the request of Peebles, with the design of entrapping me.

I suppose that there is a balance due to Peebles on the two surveys above mentioned; but his account is fraudulent *in toto*.

With high regard,

JOHN A. CUTHBERT.

JOS. SMITH, Esq.,

Chief of Bureau of Yards and Docks.

No. 7.

BUREAU OF YARDS AND DOCKS,
July 29, 1857.

SIR: The bureau has received the letter of Mr. Daniel Ratcliffe, Assistant Solicitor of the Court of Claims, which you referred yesterday for a report upon certain questions in reference to the suit of John Peebles *vs.* The United States, for alleged service as surveyor in the

employ of Mr. John A. Cuthbert, late timber agent for the southern district of Alabama.

The first question is :

“Under what authority was the contract made by Mr. Cuthbert, upon which the petitioner founds his demand?”

Mr. Cuthbert had no other authority from this bureau than its general instructions of the 27th of February, 1853, (a copy of which has been previously furnished) to make a special contract with Mr. Peebles for surveying the public lands.

The rule of the department is now, and has been heretofore, that if a timber agent reports a necessity for the services of a surveyor, and that by the employment of such an officer the public interests may thereby be advanced, authority is then vested in said agent to employ one, or not, as the judgment of the bureau may decide.

2. “What is the rule or measure by which surveyors are paid for services in cases like the one referred to?”

The rule or measure of compensation to surveyors, sanctioned by the bureau, is that which obtains in the State either by law or usage; or such sum per day; or for a given job, as may be agreed upon by the authorized agent of the department and the surveyor.

3. “What was the character of Mr. Cuthbert whilst connected with the government as timber agent; and how did he discharge his duties?”

The Bureau had a high estimate of the character of Mr. Cuthbert. He was a capable and efficient officer, and discharged his duties with industry and fidelity.

Mr. Ratcliffe's letter is herewith returned.

I have the honor to be, very respectfully, your obedient servant,
JOSEPH SMITH.

Hon. I. TOUCEY,
Secretary of the Navy.

IN THE UNITED STATES COURT OF CLAIMS.

JOHN PEEBLES, CLAIMANT, *vs.* THE UNITED STATES.

The claimant proposes to propound the following interrogatories to David Barton, before R. B. Owen, esq., commissioner of the Court of Claims, at his office in the city of Mobile, Alabama, on the 26th day of the present month, June, 1857, at 10 o'clock in the morning, or before some other commissioner of said Court at the same time and city, and at his office or place of business, whose answers will constitute his deposition as rebutting testimony to that taken by the United States Solicitor on the part of the United States, and is intended to be used as evidence in the case of John Peebles against the United States now pending in said court.

The following are the interrogatories referred to in the foregoing, viz :

1st interrogatory. Do you know whether John A. Cuthbert did or did not discharge his duties as United States timber agent with

fidelity, in the prosecution of depredators upon the public lands during the years 1854 and 1855? If yea, state all you know on the subject.

2d and last interrogatory. Do you know of any other matter relative to the claim in question? If yea, state it.

Of all which, the Solicitor of the United States for the Court of Claims, is requested to take notice.

J. F. POLK,
Attorney of Record for the claimant.

WASHINGTON, D. C.

NOTE After the witness has been sworn, and before he answers the first question, the commissioner will not forget to require him to state his name, his occupation, his age, his place of residence for the past year; whether he has any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant.

Notice accepted, subject to objections to the testimony, June 2, 1857.

DAN'L RATCLIFFE,
Assistant Solicitor of Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.—No. 601, GENERAL DOCKET.

JOHN PEEBLES *vs.* THE UNITED STATES.

To the Solicitor of the United States for the Court of Claims:

SIR: The petitioner in the case referred to above, is desirous of having the name of C. M. Godbold associated with that of David Barton named in the notice recently acknowledged by you, as a witness in said case, and whose deposition it was proposed should be taken in the form of his answers to the interrogatories which accompanied said notice, before R. B. Owen, esq., a commissioner of the Court of Claims, at his office or place of business in the city of Mobile, at the hour of ten o'clock in the morning, on the 26th day of this present month, June, 1857; and it is requested that you will make no objection to the association of the name of said C. M. Godbold as aforesaid, in order that the same interrogatories as were proposed to be propounded to the said David Barton, may also be propounded to said Godbold by the same commissioner, and at the same time and place, and his answers to the same to be taken down and forwarded to the Court of Claims as his deposition in the case, in like manner as those of the said Barton.

With great respect, your obedient servant,

J. F. POLK,
Attorney of Record for the Claimant.

I consent.

M. BLAIR, *Solicitor.*

WASHINGTON, June 17, 1857.

IN THE COURT OF CLAIMS.

JOHN PEEBLES, CLAIMANT, *vs.* THE UNITED STATES.UNITED STATES OF AMERICA, *southern district of Alabama.*

Be it remembered, that I, Richard B. Owen, a commissioner of the Court of Claims, duly commissioned and qualified, did, on this 26th day of June, A. D. 1857, cause to come before me at my office in the city of Mobile, district and State aforesaid, pursuant to the notices hereto attached, David Barton and C. M. Godbold, the witnesses in said notices named, to testify on the part of the claimant in said cause above named.

And the said Barton and Godbold having been by me first sworn to speak the truth, the whole truth, and nothing but the truth in the cause, did, thereupon, depose and say in answer to the questions hereinafter written in manner, words, and form as is hereinafter under each question written.

Witness first states:

My name is David Barton; I am fifty years old; my occupation that of a farmer and land agent; I have resided for the last year in Mobile county; I am in no way related to the claimant, and have no interest direct or indirect in the claim.

Question 1. Do you know whether John A. Cuthbert did or did not discharge his duties as United States timber agent, with fidelity, in the prosecution of depredators upon the public lands, during the years 1854 and 1855? If yea, state all you know on the subject.

Answer 1. He neglected a great deal of business he ought to have attended to; I was during the time inquired of, his deputy in the timber agency; he employed the claimant and other surveyors to go out upon the public lands and ascertain where depredations had been committed, and who were the depredators; when they found that timber had been cut on lands which by surveys they ascertained to be public lands, many of the depredators were willing on the spot to pay for the timber so cut, at the government price; the surveyors would then notify by letter Mr. Cuthbert of this willingness to settle on the part of depredators, and request him to come immediately to the scene of the depredations, which he invariably neglected to do. In consequence of his not coming, the cases went to prosecution; and at the time of the session of the court, he would meet the parties at court and then compromise with them at rates far below what the law authorized; and below what I or the surveyors could have effected on the spot; if he had have done his duty compromises could have been made, which would have made for the government a great deal of money after paying the expenses of the surveyors. There were complaints on the part of the district attorney and the surveyors against Cuthbert on account of his neglect of duty as before stated. These complaints were frequent.

Question 2. Do you know of any other matter relative to the claim in question? if yea, state it.

Answer 2. He must have compromised not less than one hundred

cases in the manner stated by me in my last answer. The compromise so made by him would not average three cents a tree for the timber so cut; whereas, had the compromise been rightly managed, they would have yielded three dollars a tree. Timber cut on public lands was seized at several mills and watchmen placed over it; and when the settlements were made the compromise did not realize enough to pay the watchmen.

Claimant was always in attendance as regularly at court as a witness as a man could be. On one occasion he was in attendance in obedience to a subpoena, and during a session of court he was sent off by Cuthbert to do a job of surveying, and whilst absent on this duty he was called as a witness, and being absent he was fined. This is the only instance in which he was absent when wanted, and in this case, at the next term of the court, his fine was remitted on an explanation of the circumstances. I know nothing more than I have already stated in my previous deposition.

DAVID BARTON.

Subscribed and sworn to before me this 26th of June, 1857.

R. B. OWEN, *Commissioner*.

At this point the further examination of witnesses was continued to Saturday, June 27, at 10 a. m.

R. B. OWEN, *Commissioner*.

MOBILE, June 27, 1857.

The examination of witnesses being this day resumed, pursuant to adjournment, C. M. Godbold was by me duly sworn, and did thereupon depose and say as follows:

Question 1. Do you know whether John A. Cuthbert did or did not discharge his duties as United States timber agent with fidelity in the prosecution of depredators upon the public lands during the years 1854 and 1855? If yea, state all you know on the subject.

The witness having answered that he is forty-eight years of age; is United States marshal for the southern district of Alabama; that he has resided for the year past in Mobile county; that he is in no way related to the claimant nor interested directly or indirectly in the claim, to the above written question answers and says:

Answer 1. I cannot specify any particular act of Judge Cuthbert in which he was culpable in the discharge of his duties, but I know that the complaints against him in his official capacity were frequent and loud.

Question 2. Do you know any other matter in relation to the claim in question? If yea, state it.

Answer 2. During the years mentioned I frequently saw the claimant Peebles, and always understood that he was employed as a surveyor for the government. I saw his statements and the reports which he made. I consulted him frequently, officially, as to the whereabouts of persons; and, at the request of Judge Cuthbert, gave

him written authority to summon witnesses in the prosecution of depredators wherever and whenever he found them. Claimant himself was subpoenaed by me regularly at every term of court as a witness, and I have seen him frequently on the stand as a witness called by the timber agent Cuthbert, and he was always interrogated as a surveyor and answered as to information which he got in that capacity.

The services of the claimant as a surveyor were valuable to the government, for the information which he obtained as such, and was able to impart on the trials, was reliable; and convictions could not be had without such facts as he testified to.

C. M. GODBOLD.

Signed and sworn to before me this 27th of June, 1857.

R. B. OWEN, *Commissioner*.

STATE OF ALABAMA, *Mobile county*.

On this 26th and 27th days of June, A. D. 1857, personally came David Barton and C. M. Godbold, the witnesses above named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the foregoing deposition were written down by the commissioner, and then proposed by him to the witnesses; and the answers thereto were written down by the commissioner in the presence of the witnesses, who then subscribed each his own deposition in the presence of the commissioner.

The depositions of D. Barton and C. M. Godbold, taken at the request of John Peebles, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of John Peebles. The adverse party was notified, did not attend, and did not object.

R. B. OWEN, *Commissioner*.

Commissioner's fees, \$5. Paid by claimant.

R. B. OWEN.

UNITED STATES COURT OF CLAIMS.

[No. 601 on the general docket.]

JOHN PEEBLES *vs.* THE UNITED STATES.

SIR: At the hour of ten o'clock, before noon, on the 4th of August, 1856, at the office of R. B. Owen, esq., one of the commissioners for taking testimony under appointment of the Court of Claims, and in the city of Mobile, Alabama, I propose to take the depositions of Elam Philips, C. K. Godbold, and David Barton, by said R. B. Owen, esq., or some other like commissioner, in the said city of Mobile, and

at his proper place of business, to be used in the case of John Peebles against the United States, now pending in said Court.

Of all which please take notice.

Very respectfully, your obedient servant,

J. F. POLK,
Attorney of record for Claimant.

M. BLAIR, Esq.,
Solicitor for the United States.

WASHINGTON CITY, D. C.

Notice served June 27, 1856.

WASHINGTON CITY, D. C.

The following are the questions the answers to which of Elam Philips, C. K. Godbold, and David Barton, it is proposed to take by R. B. Owen, esq., or some other commissioner for taking testimony under appointment of the Court of Claims of the United States, in the city of Mobile, Alabama, on the 4th day of August, 1856, to be used as testimony in the case of John Peebles against the United States, (No. 601 on the general docket,) now pending in said Court, viz:

The first question. Your name; your age; your occupation, and your place of residence during the past year?

Second question. Have you any interest direct or indirect in the claim which is the subject of inquiry, and are you related to the claimant? If yea, in what degree?

Third question. Are you acquainted with John Peebles, the claimant in this case? If yea, state how long you have known him, and what is his character as a man and a surveyor; and also for truth and fidelity in the discharge of his professional duties?

Fourth question. Have you any knowledge of a contract entered into by said Peebles and John A. Cuthbert, in virtue of which said Peebles was to execute certain surveying for the United States? If yea, state the terms of said contract; when it was entered into; the purpose for which the surveying was to be done, and in what capacity said Cuthbert entered into the contract.

Fifth question. Do you know whether said Peebles was commissioned by said Cuthbert to execute surveying under said contract?

Sixth question. Do you know whether said Peebles executed said contract on his part? If yea, state all you know on that point. State, also, what you know of the time he was employed, the difficulty, labor, and unavoidable expense of executing the surveying required under such a contract.

Seventh question. Is it customary for surveyors when executing surveying contracts to take receipts for their incidental expenses, such as payments made to chainmen, axemen, and choppers; also for provisions and travelling expenses? If you know anything on this subject, state it.

Eighth question. Do you know whether said Peebles paid any, and if any, what sums of money for said incidental expenses?

Ninth question. Do you know whether said Cuthbert refused to pay said Peebles for his services under said contract? If yea, state why he did so refuse, and whether he made any complaint against said Peebles.

Tenth question. Do you know of any instructions given by said Cuthbert, or under his authority, to said Peebles, relative to the execution of his said contract? If yea, state it.

Eleventh question. Do you know any other matter or thing relative to this claim? If yea, state it fully and particularly.

J. F. POLK,
Attorney of Record for Claimant.

WASHINGTON CITY, D. C., *June 27, 1856.*

I have no questions to ask.

M. BLAIR.

IN THE COURT OF CLAIMS.

JOHN PEEBLES *vs.* THE UNITED STATES.

Be it known that on this 4th day of August, A. D. 1856, I, Richard B. Owen, a commissioner for taking testimony, duly appointed by the honorable the Court of Claims, did, at the hour of 10 o'clock a. m., call and cause to come before me, at my office in the city of Mobile, Elam Philips, C. K. Godbold, and David Barton, to testify and the truth to say as witnesses for the claimant in the above entitled cause, now pending and undetermined in said Court.

And the said witnesses having been by me first sworn to speak the truth, the whole truth, and nothing but the truth, in said cause, did thereupon, in answer to the interrogatories hereinafter written, depose and say as follows, to wit:

That is to say, Elam Philips, being first examined, in answer to the interrogatories, answers and says as follows, to wit:

Interrogatory 1. What is your name, age, your occupation and place of residence during the past year?

Answer. My name is Elam Philips, I am fifty-two years of age, am employed by the general government as an assistant light-house keeper, and have resided near Mobile for the past thirty years.

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you related to the claimant, and in what degree?

Answer. I have no interest whatever in the claim, and am in no way related to the claimant.

Interrogatory 3. Are you acquainted with John Peebles, the claimant in this cause? If yea, state how long you have known him, and what is his character as a man and a surveyor, and also for truth and fidelity in the discharge of his professional duties.

Answer. I have known Mr. Peebles for about six years, and have been acquainted with his character for twenty-five years. His

character as a man is good ; no one has a better character. He has the character of a competent surveyor. I have myself employed him as such, and always found him perfectly competent. He stands high for truth and fidelity in the discharge of his professional duties.

Interrogatory 4. Have you any knowledge of a contract entered into by said Peebles and John A. Cuthbert, in virtue of which said Peebles was to execute certain surveying for the United States? If yea, state the terms of said contract, when it was entered into, the purpose for which the surveying was to be done, and in what capacity said Cuthbert entered into the contract.

Answer. I know of the contract inquired of. Mr. Cuthbert was acting here as timber agent of the government, and conducting certain prosecutions against persons for depredations upon the public lands. In a conversation with said Cuthbert I asked him why he so seldom succeeded in convicting the parties indicted, and his reply was that it was on account of the difficulty in defining the particular tracts upon which depredations had been committed. I then asked him why he did not employ some competent and reputable surveyor to run out the lines, &c. He said he would gladly do so if he knew where to find such a one ; I thereupon recommended to him the claimant, asking him at the time whether he had authority to employ a surveyor, and whether he or government would be responsible for his pay. He said he was fully authorized to employ, and the government would be bound for the pay. He asked me to send the claimant to him, which I did, and was afterwards told by Cuthbert that he had employed him. I do not know on what terms the claimant was employed. It was entered into some time in the month of December, 1853. The purpose for which the surveying was to be done was to identify the tracts upon which trespasses had been committed, Mr. Peebles being acquainted with all the old lines and surveys. Cuthbert told me he was authorized, as the agent of the government, to make the contract, and that government would be bound by his act.

Interrogatory 5. Do you know whether said Peebles was commissioned by said Cuthbert to execute surveying under said contract?

Answer. I only know from claimant that he was so commissioned. I advised him before he was employed to obtain such a commission ; and he afterwards told me that he had gotten one. My reason for so advising him was, that I knew that people in the country looked with distrust and ill-feeling upon persons surveying through the country, and it was best for claimant to be able to show proper authority for his acts.

Interrogatory 6. Do you know whether said Peebles executed said contract? If yea, state all you know on that point. State also what you know of the time he was employed, the difficulty, labor, and unavoidable expense of executing the surveying required under such a contract.

Answer. I know that he was busily employed in the woods running out lines ; saw him so employed, and was with him several times. Saw him in attendance at court with copies of maps of townships of this district ; saw them referred to by the receiver of the land office,

Mr. Houston, and pronounced by him correct. Said maps were used in the prosecution of trespassers on the public lands. He was employed from about Christmas to some time in the succeeding fall. I know that the claimant paid his own expenses for chain-bearers, expenses of himself and horse, furnished his own instruments, and that the difficulty and labor of such employment were great; the unavoidable expense of it amounting to not less than \$150 per month, exclusive of what would form a reasonable compensation for himself. I am not acquainted, however, with the terms of the contract with Cuthbert. I am well acquainted with this part of the country and the difficulty attendant on surveying here, and know that \$150 per month for the expenses of a survey is a low estimate.

Interrogatory 7. Is it customary for surveyors, when executing surveying contracts, to take receipts for their incidental expenses, such as payments made to chainmen, axemen, and choppers; also for provisions and travelling expenses? If you know anything on this subject, state it.

Answer. In executing the contract for the kind of surveying to be done by the claimant in this case it would be impossible to take vouchers and receipts for all the incidental expenses.

Interrogatory 8. Do you know whether said Peebles paid any, and if any, what sums of money for said incidental expenses?

Answer. I know that Peebles paid out money for said expenses; saw him from time to time paying out money, but cannot say how much he paid.

Interrogatory 9. Do you know whether said Cuthbert refused to pay said Peebles for his services under said contract? If yea, state why he did so refuse, and whether he made any complaint against said Peebles.

Answer. Cuthbert did refuse to pay Peebles for his services under said contract; and stated as the reason for such refusal that Peebles refused to give testimony in court.

Interrogatory 10. Do you know of any instructions given by said Cuthbert, or under his authority, to said Peebles relative to the execution of his said contract? If yea, state it.

Answer. I know of no such instructions.

Interrogatory 11. Do you know of any other matter or thing relative to this claim? If yea, state it fully and particularly.

Answer. I know that the claimant was fined for non-attendance at court as a witness, he then being absent in the necessary discharge of his contract; and that, too, in a portion of the country where a letter could not reach him. I was applied to to learn where a letter would reach him requesting his attendance; and I am satisfied that could the claimant have been advised of his being wanted as a witness he would have been in attendance.

ELAM PHILIPS.

To the interrogatories above written, and which have just been answered by Elam Philips, David Barton being next sworn, deposes and says: The said Barton having been present when said interroga-

tories were written out, and having had, before answering, each interrogatory carefully read over to him.

To the first interrogatory he says: I am forty-nine years of age, am a farmer by occupation, and have resided for the past year in Mobile county. My name is David Barton.

To the second interrogatory he says: I have no interest, direct or indirect, in the claim, nor am I in any way related to the claimant.

To the third interrogatory he says: I have known the claimant for thirty-odd years, and have been intimately acquainted with him for the last five or six years. His character as a man is good, and he has the reputation of a first-rate surveyor. He has ever been known to be truthful and faithful in the discharge of his professional duties. As a man he stands high as regards truth, veracity and honesty.

To the fourth interrogatory he says: I know of the contract inquired of. Cuthbert was to give him a hundred dollars a month, and was also to pay all his expenses for travelling, chain-bearers, axemen, &c. The contract was entered into on the 26th December, 1853. The purpose for which the surveying was to be done was for the purpose of identifying the tracts of public lands on which trespasses were alleged to be done. Cuthbert was timber agent for the United States for the southern district of Alabama, and in this capacity entered into said contract. I would state that my reason for knowing the terms of the contract, &c., is, that I was present when it was made, and was called upon to witness it. The contract was a verbal one. I was, at the time of the making of the contract, a deputy marshal, and also Cuthbert's assistant in the timber agency, acting under a written commission from him.

To the fifth interrogatory he says: Peebles had a written commission from Cuthbert to execute survey under said contract, and also it was a part of his duty to attach timber which he found cut upon public land.

To the sixth interrogatory, he says: Peebles did execute said contract on his part. A few days after the contract was made, Cuthbert sent him out to begin the execution of it, and for seven months he was diligently employed in the discharge of his duties under it. He surveyed large tracts of land, and also attached a large quantity of timber which had been cut on public land, for which trespass Judge Cuthbert made compromises with the trespassers.

At times, also, I would attach timber which I had cause to believe had been cut on public lands, and would send the claimant to survey the land, in order to make the proof that depredation was committed on public land. From my knowledge of the time he was employed, and of the kind of work he was sent out to do, I should say that the difficulty, labor and unavoidable expense he incurred were very great. His expense account, as charged by him, and which has been shown me, is very moderate, and its smallness can be accounted for only by the fact that, being well acquainted throughout the country, he met with facilities and accommodations in travelling and board which a stranger would not have obtained.

To the seventh interrogatory he says: The expenses of such a survey as the one made by claimant consisted of a number of very small

items, and it is not usual to take vouchers or receipts for such outlays, and frequently it is the case that it is impossible to get the receipts if required.

To the eighth interrogatory he says: I know that Peebles did pay out money for said incidental expenses, but do not know the amounts.

To the ninth interrogatory he says: Cuthbert did refuse to pay Peebles for his services under the contract. He directed me, by letter, to give Peebles notice that his services were no longer required, and afterwards told me that his reason for not embracing the claimant's account for services in the account forwarded by him to Washington was, that he thought the government would not allow that account, he (Peebles) being employed by the month, and the regulations requiring that the number of miles surveyed by each surveyor should be specified, which could not be done in claimant's case. He made no complaint against claimant except in one instance, which was for non-attendance as a witness at court, at the time alluded to by the preceding witness, Mr. Philips. I remember the occasion of his non-attendance so alluded to, and it was owing to the following reason: He was present at the meeting of the court, but the court not being in session for several days during the term, he was sent off by Cuthbert to survey a piece of land on which trespasses had been committed and timber attached, and whilst so engaged the court met again before he had had time to return. His name being called in other cases pending, and he not answering, was fined.

To the tenth interrogatory he says: The instructions given him by Cuthbert were to survey all tracts of land supposed to be government lands, on which depredations were made; and when he had so surveyed them, to prepare maps and be prepared to testify in accordance with the facts of his survey, which instructions I know were carried out by claimant. After he had been so employed for seven months he made out his account, being at the time at my house, and then presented the same to Cuthbert at his residence, twenty-eight miles below the city, and in a few days after Cuthbert wrote to me directing me to dismiss him from the public service.

To the eleventh interrogatory he says: I know that the amount agreed to be paid claimant was \$100 per month and his expenses. In the conversation between the parties as to what would be the amount of expenses, it was understood that these would not fall short of \$150 per month. It was, however, agreed that he was to charge the government only with money actually paid out by him; in other words, if he got board, or travelling expenses, or labor, free of charge, he was not to charge the same.

The claimant is an old resident of this part of the country, is well known all over the district, and can, in consequence, obtain facilities in the performance of surveying operations at much less expense than is usual.

DAVID BARTON.

At this point the further examination of witnesses in this cause was adjourned to Tuesday, August 5, 1856, at 10 o'clock a. m.

R. B. OWEN, *Commissioner*.

TUESDAY, *August 5*, 1856.

The examination being this day resumed, pursuant to adjournment, C. M. Godbold was duly sworn, and thereupon the same interrogatories which were propounded to Elam Philips and David Barton and answered by them, which are above written, were propounded to the said Godbold, and in answer thereto he says as follows:

To the first interrogatory he says: My name is Cade M. Godbold; I am forty-seven years of age, and United States marshal for the southern district of Alabama, and have resided for several years past in Mobile.

To the second interrogatory he says: Have no interest in this claim, and am in no way related to the claimant.

To the third interrogatory he says: Have known the claimant for at least twenty years. His character both as a man and a surveyor stands A, No. 1. Has frequently surveyed for me, and has always performed his duties to my entire satisfaction.

To the fourth interrogatory he says: I have no personal knowledge of the times of the contract inquired of; but I always recognized him in my official capacity as the surveyor of the timber agency in this district, and know that he was so recognized by Judge Cuthbert, the agent. He was always considered as subpoenaed at every term of the court, and it was understood between him and me that he was to be in attendance to answer all subpoenas in my hands for him. In my conversations with Cuthbert and his deputies the claimant was recognized by them as one of the surveyors of the agency. Cannot state as to the time at which the contract was entered into. The purpose of the surveying was to identify the tracts of land on which depredations had been made as government land, and to make the proof necessary for the conviction of the depredators, and for the condemnation of timber found cut upon government land.

To the fifth interrogatory he says: I do not.

To the sixth interrogatory he says: Can only speak as to the performance of the contract by claimant, on his part, to this extent, *i. e.*, I knew him to be repeatedly summoned as a witness, and to be in attendance as such on the trial of cases of trespassers on the public land. His testimony was efficient in the prosecution of such cases; and from the testimony he was able to give I judged he had understood and performed his business well. The labor and difficulty attendant upon the discharge of the duties of surveyor to the agency must have been great; and a great deal of unavoidable expense must have been incurred. I have examined the account of the claimant and think the same extremely moderate; so much so as to induce the belief that he had not charged therein many items of expense necessary to be incurred.

To the seventh interrogatory he says: I cannot answer as to the custom prevailing among surveyors.

To the eighth interrogatory he says: I know nothing of the expenditure of the claimant.

To the ninth interrogatory he says: Do not know as to Cuthbert's

refusal to pay. I never heard of any complaint from Cuthbert against the claimant as to the performance of his duties under the contract.

To the tenth interrogatory he says: I do not know what instructions were given by Cuthbert or under his authority.

To the eleventh interrogatory he says: Have answered all that I know in relation to the matter.

C. M. GODBOLD.

THE STATE OF ALABAMA, *Mobile county.*

On the fourth and fifth days of August, anno Domini 1856, personally came Elam Philips, David Barton, and C. M. Godbold, the witnesses within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the deposition of the said Elam Philips were written down by the commissioner and then proposed by him to each of the witnesses; and the answers thereto were written down by the commissioner in the presence of the witness answering, who then subscribed each his own deposition in the presence of the commissioner. The depositions of Elam Philips, David Barton, and C. M. Godbold, taken at the request of John Peebles, to be used in the investigation of a claim against the United States now pending in the Court of Claims in his name. The adverse party was notified, did not attend, and did not object.

R. B. OWEN,
Commissioner.

Commissioner's fees \$20; paid by claimant.

JOHN PEEBLES vs. THE UNITED STATES.

SIR: Please take notice that at ten o'clock in the forenoon, on the 20th day of October, 1857, at the office of R. B. Owen, esq., one of the commissioners for taking testimony under appointment of the Court of Claims, and in the city of Mobile, Alabama, I purpose to take the deposition of John A. Cuthbert, by said R. B. Owen or some other like commissioner in the said city of Mobile, to be used in the above entitled case now pending in said court.

DANIEL RATCLIFFE,
Assistant Solicitor for the Court of Claims.

J. F. POLK, Esq.,
Attorney of record for the petitioner.

Notice acknowledged October 2, 1857.

J. F. POLK,
Attorney of record for Peebles.

First question. State your name, age, occupation, and place of residence the past year.

Second question. Have you any interest, direct or indirect, in the

claim which is the subject of inquiry, and are you related to the claimant? If yea, say in what degree.

Third question. Are you acquainted with John Peebles, the plaintiff in this case, and if so when did that acquaintance commence and under what circumstances?

Fourth question. What was your relation to the government of the United States when you first became acquainted with him, Peebles?

Fifth question. State whether you made a contract with Mr. Peebles for the survey of any lands belonging to the United States in the southern district of Alabama, and if yea, give the particulars of said contract.

Sixth question. State whether you authorized the said Peebles at any time to incur expense on account of the United States, connected with the lands or interest of the said United States, of which you were the agent in southern Alabama.

Seventh question. State whether any money was paid by you as agent of the United States to the said Peebles, and if yea, under what circumstances the same was paid, particularly as to whether you regarded the said payment as a full satisfaction or not for any service rendered by him in connexion with your agency.

Eighth question. Do you know any other matter or thing relative to the claim? If yea, state it fully and particularly.

DANIEL RATCLIFFE,
Assistant Solicitor of the Court of Claims.

OFFICE OF CHIEF CLERK COURT OF CLAIMS,
October 2, 1857.

I hereby certify that the foregoing are true copies of the original notice and interrogatories filed in this office in the above case.

In testimony whereof I have hereunto set my name and [SEAL.] affixed the seal of said Court, at Washington, on the day and year above written.

EDGAR M. GARNETT,
Assistant Clerk of the Court of Claims.

IN THE COURT OF CLAIMS.

JOHN PEEBLES *vs.* THE UNITED STATES.

The deposition of John A. Cuthbert, a witness on behalf of the defendant in said cause, produced, sworn, and examined before me, one of the commissioners for taking testimony, under appointment of said Court, on this 20th day of October, A. D. 1857.

The said witness having been duly sworn by me, did depose and testify as follows:

That is to say, to the first question, viz: "State your name, age, and occupation, and place of residence for the last year," he says:

"My name is John A. Cuthbert; my age is 69 years; I am a lawyer

by profession, but I am engaged now in farming in a small way ; I reside in the lower part of Mobile county, on Mobile bay."

To the second question, viz: "Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you related to the claimant, if yea, say in what degree," he says:

"I have no interest, direct or indirect, in the claim which is the subject of inquiry, and am not related to the claimant in any way."

To the third question: "Are you acquainted with John Peebles, the plaintiff in this case, and if so, when did that acquaintance commence, and under what circumstances," he says:

"I am acquainted with John Peebles, the plaintiff in this case ; my acquaintance with him commenced in December, 1853. He had been recommended to me as a competent surveyor, by Elam Philips, and in consequence of that recommendation I had an interview with him on the street in Mobile, in which I gave him to understand that I was disposed to employ him as a surveyor, in making surveys connected with the timber agency. But at that time I made no contract with him."

To the fourth question: "What was your relation to the government of the United States when you first became acquainted with him, Peebles," he says:

"I was timber agent of the United States for the southern district of Alabama when I became acquainted with John Peebles."

To the fifth question: "State whether you made a contract with Mr. Peebles for the survey of any lands belonging to the United States in the southern district of Alabama, and if yea, give the particulars of said contract," he says:

"Some time in the early part of 1854, Mr. Peebles gave me information of a case of trespass, by cutting light wood on government land, in Clarke county ; and I desired him to survey a section, promising to pay him the customary charges for surveying it. I also employed him to survey a section from which, as I had been informed, cypress trees had been cut by a man named Strand. This land was, as I understood, in deep swamps, and as I supposed that finding the lines would be attended with much more labor than in common cases, I engaged to pay his chain carriers, besides allowing the regular fees of surveying. I believe that he executed the surveys in both of these cases. Also, in the last of July, or beginning of August, 1854, I employed him to survey the lands in Washington county, on which indictments for cutting timber were then pending. He utterly failed to execute any part of this last contract. These were the only contracts I ever made with him for surveying, except as I will hereafter explain."

To the sixth question: "State whether you authorized the said Peebles, at any time, to incur expense on account of the United States, connected with the lands or interest of the said United States, of which you were the agent in southern Alabama," he says:

"I never, except in the instance stated in the answer to the preceding interrogatory, authorized Peebles at any time to incur expense on account of any matters connected with the timber agency."

To the seventh question: "State whether any money was paid by you as agent of the United States to the said Peebles, and if yea,

under what circumstances the same was paid, particular as to whether you regarded the said payment as a full satisfaction or not for any services rendered by him in connexion with your agency," he says:

"In the summer of 1854, and I think in the month of June, I, as timber agent of the United States, paid to the said Peebles twenty-five dollars. He asked me for that sum without presenting any account, and I paid it to him in part satisfaction for the two surveys I have already stated that he made. I believe that fifty dollars would be a fair compensation for the two surveys. He never performed any other services for me as timber agent."

To the eighth question: "Do you know any other matter or thing relative to this claim, if yea, state it fully and particularly," he says:

"In my first interview with Peebles, mentioned in answer to a previous interrogatory, I had it in contemplation to employ a surveyor by the month, to make the surveys required for prosecutions recently commenced, amounting, I believe, to more than fifty. And I spoke to Peebles with that matter in my mind, but I made no contract with him. I was afterwards led to believe that these surveys would be better executed by two gentlemen named Bradford, sons of General Bradford, formerly surveyor general of Mississippi, and I engaged them by the month to make these surveys. There was no indictment for any trespass in the county of Clarke. I was informed that many spars had been cut on government lands in Clarke county. In a subsequent interview I proposed to Peebles that if he would go into Clarke county and ascertain the government lands on which timber had been cut, and the names of the trespassers, I would employ him in surveying such lands, but that he should report every case to me for my decision before he should make the survey, and I would pay him customary rates for such surveys as he should make. Peebles agreed to this proposal, and I informed him of several neighborhoods in which trespasses had been made. Peebles went to Clarke county, as I understood, to carry out this arrangement. Not long after he reported to me the case of cutting the light wood, as I have already stated, and I never heard anything more from him in relation to any trespass in Clarke county. I was disappointed that I had no prosecution for trespass in Clarke county, where I knew that a great deal of spar timber had been cut, and on my making inquiry for Peebles, at the United States court in Mobile, in the spring of 1854, David Barton told me that Peebles had been in his employment for a considerable time hunting up cases for Barton to report as informer. Peebles came to Mobile about the end of the term of the court, and I then employed him to make the survey of the cypress timber, mentioned in answer to a previous question.

"I was in the constant practice of giving to surveyors whom I employed something like a commission, which I did not consider as having any force in itself, but it was intended to give them the standing of government officers, in order to prevent ill usage from trespassers and to secure the confidence of men disposed to enforce the law. I gave such a commission to Peebles when he was about to go to Clarke county.

"I am aware that Elam Philips has testified that I informed him that I had employed Peebles by the month; in this testimony Philips has misunderstood or he has misrepresented me. I remember that in

answer to some inquiry from him, I told him in general terms that I had seen Peebles, and that I expected to employ him. I am perfectly sure that I did not tell him that I had engaged Peebles by the month. If I had told him so I would have said that which I knew to be false. Whatever may have been Philips' understanding of my language, it is not the fact that I employed Peebles by the month.

JOHN A. CUTHBERT.

STATE OF ALABAMA, }
Mobile county. } ss.

Personally came, on this 20th day of October, A. D. 1857, John A. Cuthbert, the witness named within, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of John A. Cuthbert, taken at the request of D. Ratcliffe, esq., solicitor of the Court of Claims, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of John Peebles. C. A. Bradford, esq., attorney in Mobile for claimant, was notified, did attend, but did not cross-examine because the commissioner declined to permit him so to do, as the commissioner conceived the deposition was to be taken upon the written interrogatories, which on their face were shown to have been on file, and were not crossed.

R. B. OWEN,
Commissioner.

Commissioner's fee \$5, to be taxed.

JOHN PEEBLES *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the Court.

This is a claim founded upon services alleged to have been rendered to the United States as a surveyor.

The petitioner alleges that on the 26th of December, 1853, Mr. John A. Cuthbert applied to him to execute certain surveying for the government, Mr. Cuthbert being the timber agent for the southern district of Alabama, and it being necessary to employ surveyors to run out the lines of the government lands. That Cuthbert and the claimant made a verbal contract, by which Cuthbert agreed to pay him \$100 per month and his necessary expenses for travel, chain carriers, &c. That the claimant was to give his entire time to this service, to run the lines of tracts trespassed upon when required by Cuthbert, &c., and to testify to the same on the trials in court, &c. That he was in the employ of Cuthbert for the period of seven months, and at two terms of the circuit court he testified in trials for depre-

dations on public lands. His account amounted to \$845 25, which Cuthbert refused to pay, saying he had no funds.

The first important question in the case is, whether there was any such contract, as is alleged, between Cuthbert and the claimant.

David Barton testifies that Cuthbert "was to give the claimant a hundred dollars a month, and was also to pay all his expenses for travelling, chain-bearers, axemen, &c. The contract was entered into on the 26th of December, 1853." * * * "I would state," he says, "that my reason for knowing the terms of the contract, &c., is, that I was present when it was made and was called upon to witness it." Elam Philips, after stating a conversation with Cuthbert, says: "I was afterwards told by Cuthbert that he had employed him (the claimant.) I do not know on what terms the claimant was employed. It was entered into some time in the month of December, 1853."

It thus appears that Barton testifies positively that there was a contract between Cuthbert and the claimant, and states its terms. Phillips states that there was a contract, but is unable to state what its terms were. Upon this question, we have the statement of Cuthbert himself, contained in a letter from Cuthbert to the chief of the Bureau of Yards and Docks, which is produced in compliance with a request made by the complainant; a copy of that letter is as follows:

"WASHINGTON, *March* 14, 1857.

"DEAR SIR: Your communication of the 5th instant has been received. I have endeavored to recall to mind the material facts in relation to the claim of John Peebles against the United States, and I feel certain that my recollection of them is clear and reliable. The claim is fraudulent in every part.

"I engaged the Bradfords to survey lands in the county of Washington, in preparation for prosecutions that had been commenced. I had been in the county of Clarke, and had there seen a considerable number of ship spars hewn, but not yet hauled away, and I had information that persons not known to me had been getting spars in another part of the same county. I engaged Peebles to go into Clarke county to ascertain the government land on which spars had been cut, and to survey them.

"I expected him to report what work he might do in a shape in which I could act on it, and to pay him the customary price for what work he might do. I did not enter into any contract to employ him by the month or to pay his expenses. In all cases when I employed surveyors, I found it expedient to give them written authority, in order to prevent their being interrupted by trespassers, who might wish to prevent the surveys.

"Mr. Peebles reported to me one case of trespass where lightwood had been cut on the public lands. The lightwood was seized under my authority, and a prosecution was commenced and Mr. Peebles was summoned as a witness and failed to attend. This was the only case of which he ever gave me information, and he was never summoned as a witness in any other case by my direction, or within my knowledge. I remember well that during the time covered by his account,

I inquired of David Barton whether he knew where Mr. Peebles was, for I was surprised that he gave me no information about spars; and Barton told me in reply that Peebles was in his employment, hunting trespassers for him, Barton, to return as informer.

“In the middle or latter part of April, 1854, a raft of cypress logs was brought down Mobile river, which I was informed had been taken from government land. I engaged Peebles to go to the place and ascertain, by making a survey, whether the land from which they had been taken belonged to the government. I have no doubt that Peebles made this survey and the one above mentioned. He never reported any other survey to me. I have never heard of his making any other survey for the government. He never gave me any information in relation to trespasses except in the two cases above mentioned.

“He asked me for twenty-five dollars, saying that he wanted money to pay chain carriers, not presenting any account to me. I paid him twenty-five dollars, and he gave me a receipt, the language of which seems to favor his claim; I have no recollection why the receipt was written in this form, but I conjecture that it was so written at the request of Peebles with the design of entrapping me.

“I suppose that there is a balance due to Peebles on the two surveys above mentioned. But his account is fraudulent in toto.

“With high regards,

“JOHN A. CUTHBERT.

“JOS. SMITH, Esq.,

“*Chief of Bureau of Yards and Docks.*”

Mr. Cuthbert, in his deposition, states that in December, 1853, he had an interview with the claimant, in which he gave him to understand that he was disposed to employ him as a surveyor in making surveys connected with the timber agency, but at that time he made no contract with him. In answer to a question whether he made a contract with the claimant for the survey of any lands belonging to the United States, in the southern district of Alabama, the witness answers as follows:

“Some time in the early part of 1854, Mr. Peebles gave me information of a case of trespass by cutting the lightwood on government land in Clarke county, and I desired him to survey a section, promising to pay him the customary charge for surveying it. I also employed him to survey a section from which, as I had been informed, cypress trees had been cut by a man named Strand. This land was, as I understood, in deep swamps, and I supposed that, finding the lines would be attended with much more labor than in common cases, I engaged to pay his chain carriers, besides allowing the regular fees of surveying.

“I believe that he executed the surveys in both of these cases.

“Also, in the last of July or beginning of August, 1854, I employed him to survey the lands in Washington county, on which indictments for cutting timber were then pending. He utterly failed to execute

any part of this last contract. These were the only contracts I ever made with him for surveying, except as I will hereafter explain."

He also says: "I never, except in the instance stated in the answer to the preceding interrogatory, authorized Peebles at any time to incur expense on account of any matters connected with the timber agency."

To another question he answers: "In the summer of 1854, and I think in the month of June, I, as timber agent of the United States, paid to the said Peebles twenty-five dollars. He asked me for that sum without presenting any account, and I paid it to him in part satisfaction for the two surveys I have already stated that he made. I believe that fifty dollars would be a fair compensation for the two surveys. He never performed any other services for me as timber agent."

In his answer to the eighth interrogatory, he says: "In my first interview with Peebles, mentioned in answer to a previous interrogatory, I had it in contemplation to employ a surveyor by the month, to make the surveys required for prosecutions recently commenced, amounting, I believe, to more than fifty, and I spoke to Peebles with that matter in my mind, but I made no contract with him." He also says: "I am aware that Elam Phillips has testified that I informed him that I had employed Peebles by the month. In this testimony Phillips has misunderstood, or he has misrepresented me. I remember that in answer to some inquiry from him, I told him in general terms that I had seen Peebles and that I expected to employ him. I am perfectly sure that I did not tell him that I had employed Peebles by the month. If I had told him so, I should have said that which I know to be false. Whatever may have been Phillips' understanding of my language, it is not the fact that I employed Peebles by the month."

The only evidence of the alleged contract which specifies its terms, is contained in the testimony of Barton. This is met by the positive denial of Cuthbert that any such contract was made. The allegations in the petition, therefore, are not proved. It is upon the existence of such a contract that the claim is based, and the denial by Cuthbert must be regarded as neutralizing the effect of Barton's testimony. The testimony of Phillips is merely that Cuthbert told him that he had employed Peebles, but he knows nothing of the terms of the contract, and this also is denied by Cuthbert. But even if Cuthbert had not denied it, the mere fact that Cuthbert had employed Peebles by no means sustains the allegations in the petition, and that he was employed to a certain extent is admitted by the solicitor throughout. Whatever services he did render, Mr. Cuthbert thinks would be sufficiently compensated by the sum of fifty dollars; and that sum, deducting \$25 heretofore paid him, is the only definite evidence of the value of his services, and of the relief to which he is entitled. For that sum a bill will be reported to Congress for the petitioner.

any part of this last contract. There were the only contracts I ever made with him for anything, except as I will hereafter explain."

He then says: "I never, except in the instance stated in the answer to the preceding interrogatory, authorized Leches at any time to incur expenses on account of any matters connected with the timber agency."

To another question he answers: "In the summer of 1854, and I think in the month of June, I, as timber agent of the Federal Forest, paid to the said Leches twenty-five dollars. He asked me for that sum without presenting any account, and I paid it to him in part satisfaction for the two surveys I have already stated that he made. I believe that fifty dollars would be a fair compensation for the two surveys. He never performed any other services for me as timber agent."

In his answer to the eighth interrogatory, he says: "In my first interview with Leches, mentioned in answer to a previous interrogatory, I had it in contemplation to employ a surveyor for the month, to make the survey required for presentation to the Treasury Department. I believe, to more than fifty, and I spoke to Leches with that matter in my mind, but I made no contract with him." He then says: "I am aware that when Leches has testified that I informed him that I had employed Leches by the month. In this testimony Leches has misstated, as he has misrepresented me. I remember that in answer to some inquiry from him, I told him in general terms that I had seen Leches and that I expected to employ him. I am perfectly sure that I did not tell him that I had employed Leches by the month. If I had told him so, I should have said that which I know to be false. Whatever may have been Leches' understanding of my language, it is not the fact that I employed Leches by the month."

The only evidence of the alleged contract which specifies its terms, is contained in the testimony of Leches. This is met by the positive denial of Cabhart that any such contract was made. The allegations in the petition, therefore, are not proved. It is open to the objection of such a contract that the claim is based, and the denial by Cabhart must be regarded as neutralizing the effect of Leches' testimony. The testimony of Leches is merely that Cabhart told him that he had employed Leches, but he knows nothing of the terms of the contract, and this also is denied by Cabhart. But even if Cabhart had not denied it, the mere fact that Cabhart had employed Leches by no means sustains the allegations in the petition, and that he was employed to a certain extent is admitted by the petitioners themselves. Whatever services he did render, Mr. Cabhart thinks would be amply compensated by the sum of fifty dollars; and that sum, deducting \$25 heretofore paid him, is the only definite evidence of the value of his services, and of the relief to which he is entitled. For that sum a bill will be reported to Congress for the petitioner.

MARY E. D. BLANEY, ADMINISTRATRIX.

DECEMBER 7, 1858.—Reported from the Court of Claims and committed to a Committee of the Whole House to-morrow.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MARY E. D. BLANEY, Administratrix, *vs.* THE UNITED STATES.

1. The printed record of the case, and addenda, embracing the papers used in the trial.
2. Opinion of the Court adverse to the claim.
3. The original papers of the printed record are enclosed in a separate envelope and herewith transmitted to the House of Representatives.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said Court at Washington, this seventh day of December, A. D. 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

MARY E. D. BLANEY, administratrix of George Blaney *vs.* THE UNITED STATES.

To the honorable the Judges of the Court of Claims:

The petition of Mary E. D. Blaney in her own right and as administratrix of George Blaney, late a brevet major of the Corps of Engineers in the army of the United States, most respectfully repre-

sents : that at the time of her husband's death, to wit, on the 15th of May, 1835, the government of the United States was indebted to him in a considerable sum of money, which appears from the settlement of his accounts at the treasury of the United States, made on the 9th of January, 1847, and which was paid to her on the 15th of March following; that at the time of his death there remained at his credit in the Bank of the United States, at Fayetteville, North Carolina, the sum of three thousand one hundred and eighty-two dollars and fifty-five cents, of which amount the sum of two thousand four hundred and thirty-eight dollars and twelve cents was his private funds, and for which, on the day of his death, he signed a check on said bank in favor of and payable to the order of your petitioner; that on the presentation of said check at the bank and a demand of the payment thereof the proper officer of the bank declined making payment until instructed to do so by the War Department; and on application for such instructions by the bank, the then Acting Secretary of War (C. A. Harris) forbid the payment, and directed the bank to pay over the whole amount at his credit to the treasury of the United States, which order of the Secretary of War was complied with by said bank, to the great injury and wrong of your petitioner and her orphan children.

Your petitioner is advised, and so represents, that her case is not the ordinary one of a debt due by the United States to an individual for services, upon which interest is not usually allowed, but that in consequence of the arbitrary exercise of authority by a high officer of the government, in forcibly taking the money properly belonging to her and applying it to the use of the United States, the government is as much bound by every principle of equity and justice, to pay interest for the use of such money as an individual would be; and she therefore petitions your honorable body to authorize the payment of interest upon the sum thus wrongfully and illegally withheld from her.

Your petitioner further represents in elucidation of her claim, that her late husband, Major Blaney, was, at the time of his death, and had been for many years before, in the superintendence of and the disbursing officer for the public works then in progress of construction at Oak island and Cape Fear river, in North Carolina; that at the time of his death an apparent balance appeared against him on the books of the treasury, arising by the suspension of various items of charge in his accounts, resulting from an erroneous decision by the accounting officers of the treasury in regard to the true meaning and interpretation of the army regulations of 1825, under which his disbursements were made; which decisions were overruled by the judgment of the Supreme Court of the United States in an analogous case, and in pursuance of which the suspended items in question were in part finally admitted to his credit; and if these items had been admitted in the first place, as they should have been, the result would then have been to exhibit the balance as reported on the settlement of his accounts, and paid on the 15th of March, 1847, as justly due to him at the time of the seizure of his private money under the order

of the Acting Secretary of War, and paid into the public treasury for the use of the United States.

Your petitioner also respectfully begs leave to state that, soon after the death of her said husband, and repeatedly from that time up to the 9th of January, 1847, she urged a final settlement of his public accounts, but the accounting officers of the treasury, adhering to their former decision, declined making any settlement; and hence even the small balance of pay and emolument, amounting to one hundred and fifty-two dollars and ninety-five cents, due to her said husband, was refused to be paid to her, and withheld until after the settlement of January, 1847; upon this amount she also believes herself to be entitled to interest. The documents herewith presented afford abundant evidence in support of the facts here set forth.

Your petitioner therefore humbly prays your honors to inquire into the matters hereinbefore set forth, and to grant such relief as to law and justice appertains.

The petitioner would further show that, on the 24th of February, 1848, the claim of your petitioner having been presented to the Senate of the United States, was referred to the Committee on Claims, but no action appears to have been had thereon. On the 22d of January, 1852, the same was referred to said Committee on Claims of the Senate, and on the 12th of April following a bill (No. 359) was reported to the Senate. On the 13th of December, 1853, the same was referred to the said Committee on Claims, and on the 21st of the same month a bill (No. 52) was reported to the Senate, (Rep. No. 9,) and subsequently passed the Senate; and on the 3d day of March, A. D. 1855, the same was, by the House of Representatives, referred to this honorable court.

Your petitioner further states that her husband, the late Major George Blaney, was entitled to pay for his services in receiving and issuing, and for responsibility therefor, of subsistence stores for the use of the laborers employed on the public works in North Carolina, under his charge from the year 1826 to 1835. That said service was wholly and entirely separate and distinct from those pertaining to his legitimate and proper duties as the officer in charge of the public works at Oak island and Cape Fear river, and claims the pay and allowances for such service as have been allowed in analogous cases. These claims were submitted to Congress at the same time as the claims before referred to, and adversely reported upon as stated in report accompanying bill No. 52, as aforesaid.

Your petitioner presents in detail a statement of her respective claims in a schedule hereto annexed, marked A.

Your petitioner would further show that this claim has not been assigned or transferred to any person, nor any part of the same, but the same is the property of your petitioner as administratrix as aforesaid.

Your petitioner prays your honors to inquire into the matter aforesaid, and on finding the same to be true, to grant such relief as to law and equity shall appertain.

A.

Schedule of the claims of Mary E. D. Blaney, in her own right and as administratrix of George Blaney, late major of the Corps of Engineers, referred to in the foregoing and annexed petition, viz:

No. 1.	Interest on the balance due on the settlement of accounts at the treasury, from May 15, 1835, to March 15, 1847.....	\$1,156 68
No. 2.	Interest on balance of pay and emoluments due and not paid until after said settlement, \$152 95	110 12
No. 3.	For services in receiving, issuing, and accountability for subsistence stores for the laborers employed on the public works at Oak island, N. C., in the years 1826, '27, '28, '29, '30, '31, '32, '33, '34, and to March 3, 1835—in all $69\frac{1}{6}$ months, at \$20 per month.....	\$1,382 00
	For ditto at Cape Fear river for the same period—in all $69\frac{1}{6}$ months, at \$20 per month.....	1,362 00
		2,744 00

To the honorable the Senate and House of Representatives of the United States:

The petition of Mary E. D. Blaney administratrix of George Blaney, late a brevet major of the Corps of Engineers in the army of the United States, most respectfully represents that at the time of her husband's death, to wit, on the 15th May, 1835, the government of the United States was indebted to him in a considerable sum of money, which appears from a settlement of his accounts at the treasury of the United States made on the 9th January, 1847, and which was paid to her on the 15th March following. That at the time of his death there remained at his credit in the Bank of the United States at Fayetteville, North Carolina, the sum of \$3,182 55, of which amount the sum of \$2,438 12 was his *private funds*, and for which on the day of his death, he signed a check on said bank in favor of and payable to the order of your petitioner; that on the presentation of said check at the bank, and a demand of the payment thereof, the proper officer of the bank declined making payment until instructed to do so by the War Department; and on application for such instructions by the bank, the then Acting Secretary of War (C. A. Harris) forbid the payment and directed the bank to pay over the whole amount at his credit to the treasury of the United States, which order of the Secretary of War was complied with by said bank to the great injury and wrong of your petitioner and her orphan children.

Your petitioner is advised and so represents that her case is not the ordinary one of a debt due by the United States to an individual for

services upon which interest is not annually allowed; but that in consequence of the arbitrary exercise of authority by a high officer of the government in forcibly taking the money belonging to her, and applying it to the use of the United States, the government is as much bound by every principle of equity and justice to pay interest for the use of such money as an individual would be; and she therefore petitions your honorable body to authorize the payment of interest upon the sum thus wrongfully and illegally withheld from her.

Your petitioner further represents in elucidation of her claim, that her late husband, Major Blaney, was at the time of his death, and had been for many years before, in the superintendence of and the disbursing officer for the public works then in progress of construction at Oak island and Cape Fear river, North Carolina; that at the time of his death an apparent balance appeared against him on the books of the treasury; arising by the suspension of various items of charge in his accounts resulting from an erroneous decision by the accounting officers of the treasury in regard to the true meaning and interpretation of the army regulations of 1825, under which his disbursements were made; which decisions were overruled by the judgment of the Supreme Court of the United States in an analogous case, and in pursuance of which the suspended items in question were in part, finally admitted to his credit; and if these items had been admitted in the first place as they should have been, the result would then have been to exhibit the balance as reported on the settlement of his accounts and paid on the 15th March, 1847, as justly due him at the time of the seizure of his private money under the order of the Acting Secretary of War, and paid into the public treasury for the use of the United States.

Your petitioner also respectfully begs leave to state that soon after the death of her said husband, and repeatedly from that time up to the 9th January, 1847, she urged a final settlement of his public accounts, but the accounting officers of the treasury adhering to their former decision declined making any settlement; and hence even the small balance of pay and emoluments amounting to \$152 95, due to her said husband, was refused to be paid to her and withheld until after the settlement of January, 1847. Upon this account she also believes herself to be entitled to interest. The documents herewith presented afford abundant evidence in support of the facts here set forth.

Your petitioner therefore humbly prays your honorable body to pass an act for her relief, directing the payment to her of interest upon the sums so unjustly withheld from her, and that the accounts of the late Major Blaney may be settled by the accounting officers of the treasury, upon the principles of equity and justice, and such further allowance be made in said settlement of the items still disallowed, to which he is entitled in accordance with the decisions of the courts of the United States in similar cases, by which other officers of the same corps have received allowances, and where those decisions have been in effect, affirmed by the Supreme Court on appeal, by a divi-

sion in that court in such case; and as in duty bound she humbly prays,
&c.

MARY E. D. BLANEY,
Adm'x of Geo. Blaney, late Major Corps of Engr's U. S. Army,
By R'D BURGESS, her Attorney.

WASHINGTON CITY,
February 9, 1848.

Quarterly return of provisions purchased for the subsistence of persons employed on the fortifications at Oak island, N. C., and issues of the same during the quarter ending the 31st of March, 1835.

Description of provisions.	On hand per last return.		Additions during the quarter.		Aggregate, including those additions.		Consumed during the quarter.		On hand at the expiration of the quarter.		Number of rations in the quantity consumed.	Remarks.
	Quantity.	Cost.	Quantity.	Cost.	Quantity.	Cost.	Quantity.	Cost.	Quantity.	Cost.		
Pork, barrels of -----	3	\$39 50	8	\$96 00	11	\$129 50	7	\$91 05	2	\$42 29	1, 376	1 ounce of pork,
Pork, pounds of -----	67	3 84	-----	-----	67	3 84	148	-----	119	-----	1, 376	27 ounces of
Flour, barrels of -----	9	60 16	6	39 00	15	99 16	11	77 36	4	27 68	1, 376	flour, 3 ounces
Flour, pounds of -----	172½	5 88	-----	-----	-----	-----	166	7 91	6½	5 92	1, 376	of rice, 1 ounce
Rice, pounds of -----	450	13 83	-----	-----	450	13 83	258	6 07	192	21 40	1, 376	of soap, 1½ gill
Soap, pounds of -----	389½	27 47	-----	-----	389½	27 47	86	19 92	303½	15 99	1, 376	of molasses con-
Molasses, gallons of ---	64½	20 01	53	15 90	117½	35 91	64½	-----	52½	-----	1, 376	stitute a ration.
		164 69		150 90		315 59		202 31		113 28		

GEO. BLANEY, *Brevet Major Corps of Engineers.*

SMITHVILLE, N. C., March 31, 1835.

NOTE.—Similar returns from Fort Caswell for the following quarters, viz: the 4th of 1826; the 1st of 1827; the 2d and 3d of 1830; the 1st, 2d, 3d, and 4th of 1831; the 1st, 2d, and 3d of 1832; the 2d, 3d, and 4th of 1833; the 1st, 2d, 3d, and 4th of 1834, are filed as evidence in this cause.

JOHN D. McPHERSON, *Deputy Solicitor.*

OFFICE SOLICITOR OF THE COURT OF CLAIMS,
Washington, January 10, 1857.

MARY E. D. BLANEY *vs.* THE UNITED STATES.

In the above entitled cause it is admitted on the part of the United States, that Major Geo. Blaney rendered a "quarterly return of provisions purchased for the subsistence of persons employed on the fortifications at Oak island, and issues of the same during the quarter, &c.," for the following quarters, viz: 2d and 3d of 1827; 1st, 2d, 3d, and 4th of 1828; 1st and 2d of 1829; and the 1st of 1833; the originals of all which are on file in the engineer department, and have been inspected by the undersigned. The returns for the 2d, 3d, and 4th quarters of 1828 are signed by Major Blaney as captain Corps Engineers and acting commissary subsistence; the remainder of the returns are signed by him as captain of engineers only. Lieutenant A. J. Swift rendered for the 3d and 4th quarters of 1826.

JNO. D. MCPHERSON,
Deputy Solicitor U. S. Court of Claims.

Quarterly return of provisions purchased for the subsistence of persons employed on the Cape Fear river below Wilmington, N. C., and issues of the same during the quarter ending the 31st of March, 1835.

Description of provisions.	On hand per last return.		Add'ns during the quarter.		Aggregate, including those additions.		Consumed during the quarter.		On hand at the expiration of the quarter.		The number of rations in the quantity consumed.	Number of rations issued.											
	Quantity.	Cost.	Quantity.	Cost.	Quantity.	Cost.	Quantity.	Cost.	Quantity.	Cost.		Captain's steamboat.				Superintendent.		Engineers.		Laborers.		Aggregate.	
												Men.	Rations.	Men.	Rations.	Men.	Rations.	Men.	Rations.	Men.	Rations.	Men.	Rations.
Pork, barrels of.....	3	\$34 64	14	\$164 50	17	\$199 14	10	\$125 46	7	\$84 97	2, 131	1	180	1	180	1	190	35	1, 681	38	2, 131		
Pork, pounds of.....	175½	11 29	-----	-----	175½	11 29	131	-----	44	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----
Beef, fresh, pounds of.	-----	-----	485½	29 11	485½	29 11	485½	29 11	-----	-----	222½	-----	-----	-----	-----	35	222	35	222	35	222		
Rice, pounds of.....	280½	8 78	2, 978	95 97	3, 258½	104 75	3, 258½	104 75	-----	-----	2, 353	1	180	1	180	1	190	35	1, 903	38	2, 353		
Soap, pounds of.....	-----	-----	219	15 33	219	15 33	104	7 28	115	8 05	2, 353	1	180	1	180	1	190	35	1, 903	38	2, 353		
Molasses, gallons of -	34	9 81	67	20 30	101	30 11	55	16 38	46	13 73	2, 353	1	186	1	180	1	190	35	1, 903	38	2, 353		
		64 52		325 21		389 73		282 98		106 75													

SMITHVILLE, NORTH CAROLINA,
March 31, 1835.

GEO. BLANEY,
Major, Corps of Engineers.

NOTE.—It is admitted that Captain Blaney rendered returns similar to the foregoing for the following quarters, viz: the 3d of 1829; the 1st, 2d, and 3d of 1830; the 1st, 2d, 3d, and 4th of 1831; the 1st, 2d, 3d, and 4th of 1832; the 2d, 3d, and 4th of 1833; the 1st, 2d, 3d, and 4th of 1834; the 1st of 1835; the originals of which have been produced.—Jno. D. McPHERSON, Deputy Solicitor.

WAR DEPARTMENT, *July 1, 1835.*

SIR: Your letter of the 24th ultimo has been received.

I have to request that you will deposit to the credit of the Treasurer of the United States the balance that stands to the credit of the late Major Blaney, under the following heads, on the books of your institution:

Cape Fear river.....	\$1,762 99
Oak Island	1,419 56

You will please to transmit certificates of deposit to this department, upon the receipt of which measures will be taken to pass the above sums to his credit here.

I am, &c.,

C. A. HARRIS,
Acting Secretary of War.

JOHN HASKE, Esq.,
President U. S. Bank, Fayetteville, N. C.

OFFICE BANK UNITED STATES, *Fayetteville, July 6, 1835.*

SIR: Your letter of the 1st instant is received.

Since Mr. Haske's letter to you of the 24th ultimo, a check drawn by Major Blaney for \$2,438 12 has been presented for payment. I have declined paying it until I hear from you on the subject. The check is dated the 15th May, in favor of Mary E. D. Blaney, and witnessed by Lieutenant Dimick and Major Churchill.

I am, respectfully, yours,

JNO. W. SANDFORD, *Cashier.*

C. A. HARRIS, Esq.,
Acting Secretary of War.

DEPARTMENT OF WAR, *July 10, 1835.*

SIR: I have received your letter of the 6th instant, in which you state that a check of Major Blaney in favor of Mary E. D. Blaney, for \$2,438 12, has been presented, which you have declined paying before the views of this department are ascertained.

In reply I have to state, that no reason is perceived for changing or revoking the instructions of the 1st instant.

I am, &c.,

C. A. HARRIS,
Acting Secretary of War.

JNO. W. SANDFORD, Esq.,
Cashier B. B. U. States, Fayetteville, N. C.

ENGINEER DEPARTMENT,
Washington, February 8, 1848.

I certify that the foregoing letters to John Haske, esq., president U. S. Branch Bank, Fayetteville, N. C., to C. A. Harris, Acting Secretary of War, and to John W. Sandford, cashier of B. Bank U. S. at Fayetteville, N. C., are true copies from the records of this office.

JOS. G. TOTTEN,
Colonel and Chief Engineer.

TREASURY DEPARTMENT,
Second Auditor's Office, January 9, 1847.

SIR: Enclosed is a certificate, No. 3088, for \$152 95, payable by the paymaster here (T. P. Andrews) to you or order, as the attorney of the administratrix, the same being for the pay and emoluments of Brevet Major George Blaney, of the (military) Corps of Engineers, from April 1, 1835, to May 15, 1835, when he died, which you will please take charge of accordingly.

Respectfully, &c.,

JNO. M. McCALLA,
Second Auditor.

RICHARD BURGESS, Esq., Attorney &c., Present.

True copy :

J. F. POLK,
Chief Clerk Second Auditor's Office.

TREASURY DEPARTMENT,
Third Auditor's Office, January 9, 1847.

SIR: A special statement has been made of the account of the late Major George Blaney of the Corps of Engineers, by the accounting officers of the treasury, wherein the following sums have been applied to his credit in liquidation of the balances heretofore standing at his debit in reference to these works, viz :

On account of fortifications at Oak island	\$130 43
On account of improving the navigation of Cape Fear river	1,684 09
	<u>1,814 52</u>
And there still remains at his debit on account of Quartermaster's Department, the sum of.....	<u>\$26 00</u>

The difference of \$4,586 96 resulting from the present adjustment of Major Blaney's account, between \$6,401 48, the amount of credits claimed in the account presented by his representative, and the

amount passed to his credit as above stated, will be found explained by reference to the statement herewith enclosed.

Very respectfully, your obedient servant,

PETER HAGNER, *Auditor.*

RICHARD BURGESS, Esq.,

Attorney of Mrs. Mary E. D. Blaney,

Adm'x of Major George Blaney, deceased,

Washington, D. C.

Statement of difference arising on settlement of an account presented by the representative of the late Major George Blaney, deceased, in which the following credits were claimed, viz:

For the difference between the amount of compensation to which the deceased was entitled on his disbursements on account of fortifications at Oak island, between 1st January, 1826, and 3d March, 1835, and the amount heretofore allowed.....	\$1,161 02
For the same on his disbursements on account of works at Cape Fear river, between 29th May, 1829, and 3d March, 1835.....	2,366 34
For the amount of voucher four heretofore suspended, on account of works at Cape Fear river.....	130 12
For services as assistant commissary of subsistence at Oak island, between 1st January, 1826, and 3d March, 1835, 69 $\frac{1}{6}$ months, at \$20 per month.....	1,382 00
For similar services at Cape Fear river, between the 3d quarter, 1829, and 3d March, 1835, 62 $\frac{1}{6}$ months, at \$20 per month.....	1,362 00
Amounting to.....	\$6,401 48

On the above items the following allowances have been made, and the sums hereinafter specified passed to the credit of the deceased, in pursuance of the decision of the Second Comptroller of 8th January, 1847, viz:

Additional compensation on his disbursements for fortifications at Oak island—allowed.....	\$1,161 02
From which was deducted for want of appropriation.....	*1,030 49

This sum passed to his credit on that account..... \$130 43

*Appropriated at the last session, and paid to Mrs. Blaney 15th March, 1847.

Additional compensation on account
of the works at Cape Fear river—
allowed \$2,155 89
From which was deducted for want
of appropriation *601 92

This sum passed to his credit on ac-
count of this work \$1,553 97
The amount of suspended voucher No. 14, re-
turned with the required evidence and ad-
mitted, on account of Cape Fear river 130 12

Amount allowed and passed to the credit of de-
ceased, closing his accounts for the above
works as per official statement \$1,814 52

Amount of difference \$4,586 96
=====

The difference is thus accounted for—

Amount suspended for want of appropriation on
account of fortifications at Oak island \$1,030 59
On account of works at Cape Fear river 601 92
----- \$1,632 51

Amount disallowed, embracing the two items of charge
above stated for services as assistant commissary of sub-
sistence, viz: \$1,382 and 1,362, amounting to 2,744 00

Add the difference between \$2,366 34, claimed for addi-
tional compensation on account of Cape Fear river, and
\$2,155 89, the sum allowed as stated above 210 45

Amount of difference, as above stated 4,586 96
=====

The amounts passed to the credit of Major Blaney, as herein
before stated, having been applied to close his accounts for
the works at Oak island and Cape Fear river, there still
remains at his debit on account of Quartermaster's Depart-
ment, the sum of \$26 00
=====

TREASURY DEPARTMENT,
Third Auditor's Office, January 9, 1847.

TREASURY DEPARTMENT,
Third Auditor's Office, February 9, 1848.

SIR: In reply to the request contained in your letter of this date,
to be informed as to the settlement and close of the accounts of the

^cAppropriated at the last session, and paid to Mrs. Blaney 15th March, 1847.

late Major George Blaney, of the Corps of Engineers, for disbursements on account of fortifications at Oak island and improvements of Cape Fear river, I have to state that the accounts having been reported to the Second Comptroller for his decision, on the 12th March, 1847, and returned by him on the following day, the result was a balance in favor of the estate of the deceased of \$1,606 50, which sum you will recollect was paid to you as attorney of the administratrix at this office on the 15th March, 1847.

Respectfully, your obedient servant,

PETER HAGNER, *Auditor.*

RICHARD BURGESS, Esq.,
Washington City.

TREASURY DEPARTMENT, *March 24, 1852.*

SIR: I have the honor to transmit herewith the report of the Third Auditor dated 23d instant, upon the case submitted to him in the papers enclosed in your letter of the 11th instant, returning also the papers.

Very respectfully, your obedient servant,

WILLIAM L. HODGE,
Assistant Secretary of the Treasury.

Hon. THOMAS G. PRATT, *United States Senate.*

Hon. Thomas G. Pratt, United States Senate, March 11, 1852, transmits a statement of the claim of the estate of the late Major George Blaney, engineers; copy of a letter from the Third Auditor of the 9th January, 1847, and copy of a statement of differences.

And asks to be informed—

1st. What was the decision of the circuit court for New York in the case of Major Delafield?

2d. Whether the accounts of any officer have been settled under it? And,

3d. What effect that decision would have if applied to the claim of the widow and administratrix of the late Major Blaney, now pending before the Committee on Claims of the Senate?

The files of this office furnishing no information in regard to the 1st and 3d queries of this letter, it is respectfully referred to the Solicitor of the Treasury, with the request that he will inform me of the decision of the court in Major Delafield's case, and also of the bearing of that decision if any on the case of the late Major Blaney.

Please return these papers.

JOHN S. GALLAHER, *Auditor.*

THIRD AUDITOR'S OFFICE, *March 15, 1852.*

THIRD AUDITOR'S OFFICE: Received back March 19, 1852. The letter of Hon. Mr. Pratt will be retained on file in this office.

TREASURY DEPARTMENT,
Solicitor's Office, March 18, 1852.

SIR: I have the letter of the Hon. Mr. Pratt, and the papers which accompanied relating to the claim of the representative of the late Major George Blaney, referred by you to this office.

In reply to your inquiries I have to state that after strict search no copy of the decision of the circuit court for New York in the case of Major Delafield can be found on the files of the office. I enclose you, however, a copy of a letter from this office, dated December 28, 1844, to the Second Comptroller of the Treasury in regard to the final adjustment of Major Delafield's account under the decision of the Supreme Court affirming the decision of the circuit court, and which, I have no doubt, recites with substantial accuracy the said decision. From that letter you will perceive that the affirmation of the decision of the circuit court was not made in the form of a *positive decision*, but *resulted* from an equal division of the court.

In consequence of this circumstance this office appears to have formed the opinion that nothing was settled by it but the suit with Major Delafield; and the solicitor refers to the case of General Gratiot, which was understood to involve some of the same questions, in which it was understood the Supreme Court would prepare a full opinion. The case of General Gratiot will be found reported at large in Howard's Reports, vol. 4, p. 81, &c.

If full and exact information in regard to the decision of the circuit court in the case of Delafield is desired, it will be found in the copy of the record filed in the Supreme Court.

How far the decisions in the cases of Delafield and Gratiot bear upon the claims of Major Blaney the committee who have it under consideration are more competent to decide than I am.

I return the letter of Mr. Pratt and the papers which accompanied it; and am, very respectfully, your obedient servant,

J. CLARK, *Solicitor.*

JOHN S. GALLAHER, Esq.,
Third Auditor of the Treasury.

OFFICE OF THE SOLICITOR OF THE TREASURY,
December 28, 1844.

SIR: I submit the following statement in reply to your letter of the 27th instant, touching the further withholding of the pay of Major Delafield:

The judgment of the circuit court in the case of the United States *vs.* Richard Delafield, has been affirmed by the Supreme Court at the present term by a divided court. This case involves some of the same questions which arise in that of Colonel Gratiot, in which it is understood the court will prepare a full opinion. At the hearing of the case *vs.* Delafield in the district court the United States attorney requested the court to give the following instructions to the jury:

1st. That the duties performed by the defendant, being the ordinary duties appertaining to the office of an engineer, he was bound to perform the same without any extra compensation beyond his pay and emoluments as such officer on account of such service.

2d. That the rules and regulations of the army do not allow any extra compensation to officers of the engineers for services performed in relation to any works other than fortifications.

3. That no usage can bind the department to allow any extra compensation not allowed by law.

4th. That there is no such usage proved.

5th. That there is no proof of any contract, express or implied, to pay any such extra compensation.

6th. Any special allowances made by the department for special reasons, do not show a general usage or create any liability to make the same allowance in cases where, in their judgment, such special reasons do not exist. The allowance being an act of discretion, the department is the sole judge of the propriety of such allowance.

7th. That the rules and regulations of the army in regard to the compensation to be allowed to officers discharging the duties of assistant commissaries of subsistence, apply to issues to troops of the army only; and any allowance for the performance of the duty of assistant commissaries of subsistence to laborers and workmen must rest entirely in the discretion of the department, and that the department has exercised such discretion in refusing such allowance to captains, being extra compensation; which instructions the judge refused to give; whereupon, the United States attorney excepted.

The judge instructed the jury that if any account had been once settled and allowed at the Treasury Department, the items of that account so allowed could not, without further notice, be re-examined and disallowed by the department and charged as a difference in a subsequent account. To this part of the charge the United States attorney excepted.

That so far as respected the defendant's charge for compensation for services rendered as assistant commissary, which had been disallowed, there was no foundation for the distinction between the services, whether rendered by a lieutenant or a captain, as set up and insisted on in this case. To this part of the charge the United States attorney excepted.

That the regulation of the army equally applied to both officers when rendering like services. That, as respected the per diem allowance charged in this case and disallowed by the accounting officers of the Treasury, there is no distinction between disbursements made on a civil or military work, so far as respects the claims of the disbursing officer, under regulation of the army issued from the War Department. To this part of the charge the United States attorney excepted.

The jury found a verdict for the defendant. The cause was brought up to the circuit court, and the judgment of the district court was affirmed.

Under such circumstances I am not aware of any objection to re-

lieving Major Delafield from the stoppage of his pay. As requested, I return the letter of Major Delafield which was enclosed in your communication of the 27th instant.

I am, very respectfully, your obedient servant,

C. B. PENROSE, *Solicitor*.

ALBION K. PARRIS,

Second Comptroller.

TREASURY DEPARTMENT,

Third Auditor's Office, March 23, 1852.

SIR: In reference to the claim of the administratrix of Major George Blaney, Corps of Engineers, deceased, enclosed in the letter from the Hon. Thomas G. Pratt, of the 11th instant, I have the honor to state:

That there being no information on the files of this office in regard to his first and third inquiries, the letter and papers enclosed were referred to the Solicitor of the Treasury, with the request that he would communicate the desired information to this office.

The Solicitor's letter of the 18th instant, and a copy of the letter of Mr. Solicitor Penrose of the 28th instant, December, 1844—in reference to the case of Delafield, referred to by the claimant—enclosed therein, are respectfully furnished herewith, in reply to the first and third inquiries.

In reply to the second inquiry, I have to state that the records of this office furnish no evidence of the account of any officer having been settled under the decision of the circuit court for New York in the case of Major Delafield.

On examining the papers enclosed by the Hon. Mr. Pratt, it is perceived that the letter from this office of the 9th January, 1847, is mainly in reference to the special statement of that date; but the report of the Third Auditor of the 5th, and Second Comptroller's decision thereon of the 8th January, 1847, furnished to the attorney of the administratrix on the 6th May, 1847, do not appear to have been submitted with the claim. Deeming these to be essential to a full and clear understanding of its merits, irrespective of any bearing in the case of Major Delafield may or may not have thereon, I respectfully transmit an extract of so much as relates to the claim for pay for Major Blaney's services as assistant commissary of subsistence, and an extract from the Auditor's report of the 4th April, 1845, and from the Comptroller's decision thereon, dated June 23, 1845.

The act of March 2, 1821, "to reduce and fix the military peace establishment," enacts * * * * "that there shall be as many assistant commissaries as the service may require, not exceeding fifty, who shall be taken from the subalterns of the line, and shall, in addition to their pay in the line, receive a sum not less than ten nor more than twenty dollars per month." * * * * . And the allowance of \$20 per month to *subaltern* officers stationed on the Gulf of Mexico, who were not receiving the compensation for disburs-

ing, is supposed to have been granted by the Secretary of War, in 1843, under that authority.

The papers transmitted by the Hon. Mr. Pratt—viz: the claim of Mrs. Blaney; the copy of a letter from this office to Richard Burgess, esq., attorney, dated January 9, 1847, and the copy of the statement of differences to which it refers—are returned herewith.

I have the honor to be, with great respect, your most obedient,
JNO. S. GALLAHER, *Auditor*.

Hon. THOMAS CORWIN,
Secretary of the Treasury.

Extract from the report of the Third Auditor on the items of credit claimed by the representative of Major George Blaney, late of the Corps of Engineers, deceased, presented 17th December, 1846—report dated January 5, 1847.

* * * * *

“In regard to the fourth and fifth items, to wit, a claim of twenty dollars per month, for services as acting assistant commissary of subsistence, in reference to each of the public works before mentioned, heretofore frequently rejected in the several settlements made of the accounts of the deceased, it seems only necessary now to refer to the repeated unequivocal decisions of the accounting officers of the Treasury, and especially to the last decision of the Comptroller in relation thereto, subjoined to the accompanying report from the Third Auditor of the 4th of April, 1845; and further to remark that the disbursements made by the deceased for procuring subsistence for the use of the laborers and workmen employed on the works were as applicable thereto as were any other items of expenditure for materials, &c., embraced in his accounts; and the sums so expended constituting portions of the aggregate amounts on which compensation has been allowed, he received the only equivalent for such services to which he was considered entitled under existing regulations. It was certainly his duty to show that the provisions, as well as other property purchased, had been properly applied to the public service—and such duty constituted an essential branch of the extra service assigned him—for a faithful performance of which, on his part, the regulations provided a specific compensation in the form of a per diem or commission. And hence it will be perceived that, in accounting for the public moneys and the public property entrusted to his hands as the superintendent or agent for those public works, no separate, distinct, or independent service was either required or performed, and that consequently Major Blaney discharged no duty that was not, from the nature and character of the services imposed, necessarily involved in, and inseparably connected with, their fulfilment.

* * * * *

Extract from Second Comptroller's decision on the foregoing.

"TREASURY DEPARTMENT,
"Second Comptroller's Office, January 8, 1847.

* * * * *

"The claims for services as an assistant commissary cannot be admitted.

"ALBION K. PARRIS, *Comptroller.*"

*Extract from the Third Auditor's report of the 4th of April, 1845,
referred to in the foregoing.*

* * * * *

"The third item in the claim of Mrs. Blaney is for the services of Major Blaney, doing the duty of assistant engineer in receiving, issuing, responsibility and accountability of the subsistence stores purchased for the work people employed on the erection of the fort at Oak island, N. C., in part of the years 1826, '27, '28, '29, '30, '31, '32, '33, '34, and to March 3, 1835—in all, $69\frac{1}{10}$ months, at \$20, = \$1,382.

"This claim is not considered admissible. There is no authority for the charge. Mr. Calhoun, the Secretary of War, in a letter to the Third Auditor, dated December 3, 1823, decided 'that \$20 per month, in addition to their pay and emoluments, should be allowed to subaltern officers stationed on the Gulf of Mexico, who were not receiving the compensation for disbursing, as a compensation for the performance of the duties of assistant commissary of subsistence.' Major Blaney, being in the receipt of \$2 per day for disbursing, is therefore excluded under that decision.

"In the case of Lieutenant S. Tuttle, who claimed the allowance of \$20 per month for performing the duties of assistant commissary of subsistence at Oak island, N. C., from November 1 to December 31, 1825, Mr. Eaton, then Secretary of War, on the 10th February, 1829, made the following decision, viz: 'The above allowance seems to be at variance with the practice heretofore maintained by the accounting officers. The Secretary of War is indisposed to alter any rule the tendency of which shall be to enlarge expenditure. It is accordingly disallowed. Signed, J. H. Eaton.'

"In view of the principles established in the above mentioned cases, the Third Auditor considers the claim of Major Blaney not admissible.

"The fourth item is a claim for a similar allowance at Cape Fear river during the years 1829, '30, '31, '32, '33, and '34, and to 3d March, 1835—in all, $68\frac{1}{10}$ months, at \$20 per month, \$1,362—which is considered to be inadmissible for the reasons stated above."

* * * * *

Extract from the Comptroller's decision on the Auditor's report of the 4th of April, 1845.

"TREASURY DEPARTMENT,
"Second Comptroller's Office, June 23, 1845.

"If the two first items in the account of Mrs. Blaney come within the decision of the Supreme Court in the case between the United States and General Gratiot, they should be allowed.

* * * * *

"It seems to me that the other items in the account are inadmissible.

"ALBION K. PARRIS, *Comptroller*"

TREASURY DEPARTMENT,
Third Auditor's Office, May 9, 1856.

SIR: Agreeably to an order from the Court of Claims, dated April 10, 1856, a certified copy of which was transmitted to you, and by you referred on the 12th of the same month to this office, I herewith enclose sundry original abstracts or returns rendered by Major George Blaney, deceased, late Corps of Engineers, of provisions received and issued to persons employed on the fortifications at Fort Caswell (Oak island) and improvements of Cape Fear river, North Carolina, between the 4th quarter of 1826 to the 1st quarter of 1835, inclusive. The abstracts for some of the quarters within the above period are not found on file; those which are sent herewith being all which were transmitted to this office with Major Blaney's accounts.

I also enclose a list of these abstracts, to which is appended a receipt which, it is requested, will be signed by the Clerk of the Court of Claims, and transmitted to you or to this office, to be retained until the abstracts shall be returned for file with the accounts from which they have been withdrawn.

I deem it proper to state that a claim was presented by the administratrix of Major Blaney for his services as assistant commissary of subsistence at Oak island and Cape Fear river, which was rejected by the accounting officers as inadmissible; and that for a part of the period for which compensation was claimed on account of Oak island, Major Blaney had made payments for the same services to other officers; that is, he paid Lieutenant *R. D. A. Wade* for services as assistant commissary of subsistence at Oak island for *one and a half* ($1\frac{1}{2}$) month, in the *second quarter* of 1829, at \$20 per month, and *Lieutenant A. J. Swift* for similar services at the same place, for the months of *November* and *December*, 1830, at the same rate, and that the vouchers for said payments were *certified by Major Blaney*.

The communications referred by you to this office are herewith returned.

I have the honor to be, very respectfully, your obedient servant,
SAM'L S. RIND, *Acting Auditor*.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

TREASURY DEPARTMENT,
Third Auditor's Office, May 13, 1856.

SIR: I have the honor to enclose herewith the provision returns requested by the Court of Claims, rendered by Major George Blaney between the 4th quarter of 1826 and 1st quarter of 1835, together with a list of the same, to be receipted for by the Clerk of said Court.

The several returns for the different works are distinguished by the respective periods to which they relate, and not by the numbers of the settlements which were endorsed upon them at the time they were withdrawn merely to designate the particular settlement with which each was filed, in order that they may be restored to their proper files with greater facility when they shall be sent back to this office. The numbers of the settlements have no necessary connexion with the returns, and, having been endorsed upon them for a purpose which does not extend beyond this office, it has been deemed proper to omit them in the list sent herewith.

Very respectfully, your obedient servant,

SAM'L S. RIND, *Acting Auditor.*

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

WAR DEPARTMENT,
Washington, February 6, 1857.

SIR: I have received your letter of the 27th ultimo, enclosing an order of the Court of Claims asking information whether Major George Blaney performed the duty of assistant commissary of subsistence at the works on Cape Fear river and at Oak island, between the last quarter of 1826 and first quarter of 1835, &c., and, in reply, transmit a report of the Commissary General, stating that he did not perform any duty in his department during the period stated; and also a report of the chief engineer, stating that Major Blaney, while superintending engineer and disbursing officer at the works above named, purchased and supplied provisions to the laborers employed upon them, and that for this service he claimed and paid himself, during parts of the years 1826, 1827, and the whole of the year 1828, the \$20 per month allowed by law to subaltern officers while acting as assistant commissaries of subsistence. These payments were disallowed by the accounting officers and by the Secretary of War, and the amount of them was refunded by Major Blaney.

Very respectfully, your obedient servant,

JEFFER. DAVIS,
Secretary of War.

S. H. HUNTINGTON, Esq.,
Chief Clerk Court of Claims, Washington.

OFFICE OF COMMISSARY GENERAL OF SUBSISTENCE,
Washington, January 30, 1857.

SIR: In obedience to your instructions to report upon the order of the Court of Claims for information "whether Major George Blaney performed the duty of an assistant commissary of subsistence between the last quarter of 1826 and the first quarter of 1835, both inclusive," I have the honor to state, the books of this office show that Major George Blaney did not perform any duty under my instructions, or in connexion with this department, during the time stated; never having received any funds from the appropriation for army subsistence, nor subsistence stores belonging to this department, and never having rendered an "account" or "return" to this office between the last quarter of 1826 and the first quarter of 1835, both inclusive.

Very respectfully, your most obedient servant,

GEO. GIBSON,
Commissary General of Subsistence.

HON. JEFFERSON DAVIS,
Secretary of War.

ENGINEER DEPARTMENT,
Washington, February 5, 1857.

SIR: In answer to the request from the Court of Claims, dated the 27th ultimo, and referred by you to this office for report of "information whether Major George Blaney performed the duty of an assistant commissary of subsistence at the works for the improvement of Cape Fear river and the works at Oak island, between the last quarter of 1826 and the first quarter of 1835, both inclusive," I have the honor to state:

That there is no information in this office that Major Blaney performed duty as "commissary of subsistence" at either of the works specified.

As the superintending engineer and disbursing officer of those works, Major Blaney purchased and supplied provisions to the laborers employed upon them, and he claimed, and paid himself, for that service, a special compensation at the rate then allowed by regulations to subaltern officers while acting as "assistant commissary of subsistence," (\$20 per month,) as follows, viz:

For part of the 3d quarter of 1826	\$20
For the 4th quarter of 1826	60
For the 1st, 2d, and 3d quarters of 1827	180
For the 1st, 2d, 3d, and 4th quarters of 1828	240
	500

In settling the accounts in which these charges were made, the amount claimed for this service was disallowed by the accounting

officers of the treasury; but the charge was, notwithstanding, continued for the period just stated, and until Major Blaney was informed from this office that, upon an appeal from him, "the Secretary of War has decided that no allowance shall be made to the disbursing officer for compensation as assistant commissary of subsistence, as the commissions for disbursements cover the responsibility incurred in this as in other cases."

The disallowed amount was subsequently refunded by Major Blaney, and he does not appear to have renewed the charge.

The application from the Court of Claims, and the papers referred with it, are respectfully returned.

I am, very respectfully, your most obedient,

JOS. G. TOTTEN,

Brevet Brigadier General Topographical Engineers.

HON. JEFF'N DAVIS,

Secretary of War.

TREASURY DEPARTMENT,

Second Comptroller's Office, January 7, 1857.

SIR: Your letter of the 26th ultimo, asking for certain information to be used in the case of Mrs. Mary E. D. Blaney, administratrix of Major Geo. Blaney, before the Court of Claims, was received on the 1st instant, and on that day I wrote to the Third Auditor requesting him to furnish the information called for, and I now transmit his reply, dated yesterday, to my letter.

Very respectfully, your obedient servant,

J. M. BRODHEAD,

Comptroller.

JNO. D. MCPHERSON, Esq.,

Deputy Solicitor Court of Claims, Washington, D. C.

TREASURY DEPARTMENT,

Third Auditor's Office, January 6, 1857.

SIR: I have received your letter of the 1st instant, in which you request to be furnished with any information to be found in this office relating to the following inquiry made of you by J. D. McPherson, esq., deputy solicitor of the Court of Claims, at the request of the Court, viz: "Whether any person was paid for services in receiving, issuing, and accountability for subsistence stores for the laborers employed on the public works at Oak island, (Fort Caswell,) North Carolina, from the 1st September, 1826, to the 3d March, 1835, and at Cape Fear river for the same period," credit being claimed by Mrs. Mary E. D. Blaney, widow and administratrix of Major Geo. Blaney, at the rate allowed for an acting assistant commissary of subsistence for the time between these two dates. In reply, I have to state that

it does not appear that any payment was made to Captain Blaney for such services at the time mentioned; but he is found to have paid to Lieutenant R. D. A. Wade, at Oak island, as acting assistant commissary of subsistence, in 3d quarter 1829, \$90; in 4th quarter 1829, \$60; and in 1st and 2d quarters 1830, \$120—in all, \$270. He also paid Lieutenant A. J. Swift, acting in the same capacity, at the same place, from 1st November, 1830, to 31st March, 1831, for 2d, 3d, and 4th quarters 1831, for 1st quarter 1832, and from 31st March to 31st May, 1832, the sum of \$380, being at the rate of \$20 per month.

I also find that he had in his employment, at the above mentioned place, in the 4th quarter 1826 and in the 1st quarter 1827 and 3d quarter 1829, 1 superintendent, at \$3 50 per day; 1 clerk, at \$60 per month; 1 overseer, at \$1 50 per day; 3 sub-overseers, at \$1 per day each; a baker and assistant baker, each at \$20 per month, together with a victualler and several cooks. It is presumed that such persons were employed during the whole time; and if it should be deemed desirable, an examination will be made to ascertain whether that was really the case. The memorandum of certain payments received by you from Mr. McPherson is herewith returned.

Very respectfully, your obedient servant,

ROB. J. ATKINSON,
Auditor.

J. M. BRODHEAD, Esq.,
Second Comptroller.

THE UNITED STATES,

*To the estate of Major George Blaney, deceased,
late of the Corps of Engineers, DR.*

To interest on \$2,438 12, the private funds of Major Blaney, and for which he signed a check in favor of Mrs. Blaney on the day of his death, on the Bank of the United States, at Fayetteville, North Carolina, which check the bank refused to pay under instructions of the Acting Secretary of War, and which sum was placed in the treasury of the United States for the public use, as fully set forth and explained in the memorial to Congress, viz: from 15th May, 1835, to the 13th March, 1847, at 6 per cent. per annum, being eleven years nine months and twenty-nine days, is\$1,730 41

To interest on \$152 95, being the amount of pay and emoluments due to Major Blaney at the time of his death, the payment of which was withheld until her accounts were finally settled on the 13th March, 1847; the non-settlement of his accounts arising from an erroneous decision of the accounting officers, as shown by a decision of the Supreme Court in an analogous case, and in pursuance of which Major Blaney's accounts were finally settled,

resulting in a balance in his favor, as stated and claimed by him, at six per cent. per annum, being eleven years nine months and twenty-nine days \$115 02

1,845 43

E. E.

MARY E. D. BLANEY,
Administratrix of Major George Blaney,
 By R. BURGESS, *her attorney.*

[See correspondence between the officers of the bank and the Acting Secretary of War, (C. A. Harris,) filed with the petition.]

THE UNITED STATES,

To the estate of Captain George Blaney, deceased,
late of the Corps of Engineers, Dr.

For services in receiving, issuing, responsibility and accountability for subsistence stores for the laborers employed on the public works at Oak island, North Carolina, in the years 1826, '27, '28, '29, '30, '31, '32, '33, '34, and to 3d March, 1835—in all, $69\frac{1}{6}$ months, at \$20 per month \$1,382

For same services at Cape Fear river, North Carolina, for the same period—in all, $68\frac{1}{6}$ months, at \$20 per month 1,362

\$2,744

The authority for the above charge is found in the case of Major Delafield, of the Corps of Engineers, for similar services between the years 1822 and 1830; within that period he was a lieutenant, and promoted to a captaincy; was the officer in superintendence of the fortifications then erecting at Fort Jackson, on the Mississippi; and also acting as assistant commissary for the laborers employed on that work. For this latter service he charged at the rate of \$20 per month, which, on the settlement of his accounts, was disallowed by the accounting officers of the treasury, on the ground that he was at the time in the receipt of the extra compensation allowed by the regulations of the army to disbursing officers. At a subsequent period the claim was submitted to the Secretary of War, (Mr. Poinsett,) who directed that the usual allowance of \$20 a month should be paid to Major Delafield for the period he acted as assistant commissary at Fort Jackson until his promotion to a captaincy, after which the allowance could not be legally made. It was accordingly so allowed in the settlement of his accounts. The amount charged for the period subsequent to his promotion was disallowed, and formed an item in dispute when suit was instituted against him. On the trial of the case in the circuit court of New York, (Judge Betts presiding,) it was decided that the allowance appertained to the officer *performing the duty*, without regard to his rank, and his claim was admitted. An appeal on this, with other questions at issue, was taken to the Supreme Court of the United States, where, after hearing argument,

at December term, 1844, the court being equally divided, the judgment of the court below stood affirmed. The language employed in the Supreme Court, that the judgment of the circuit court is "affirmed," is deemed to have established the law in the case for all practical purposes; and hence the principal of the allowance claimed by Major Blaney is considered to have been sanctioned by the highest judicial authority, and, as such, should be binding upon the accounting officers of the treasury. It is believed to be the universal practice in the settlement of questions under the revenue laws, in the Treasury Department, to be governed by the decisions of the courts in the allowances of accounts and claims. But, independent of all this, and admitting, for the sake of the argument, the views above presented to be incorrect, yet the high respect and deference due to such distinguished authority as the courts referred to it was hoped would have had its just weight with the accounting officers in the exercise of their discretionary power in such cases, to have induced a decision favorable to the claim now under consideration, identical in principle with the case decided by those courts. This, moreover, would seem to be one of those cases in which, with great propriety, might be applied the humane and wise maxims of the law, that whenever there is a doubt, that doubt should operate in favor of the weak against the strong, the one against the many, the individual instead of the government. Yet, notwithstanding all these considerations, the accounting officers have refused to admit the claim; an appeal is therefore made from their decision to the more just and enlightened representatives of the people, by

MARY E. D. BLANEY,
Administratrix of Major George Blaney,
 Per R. BURGESS, *her attorney.*

WASHINGTON CITY,
 February 22, 1848.

—

Upon examination of the subsistence returns by Major Blaney, in the engineer department, I find that, after deducting from the whole period of his service from 1826 to 1835, the time for which other officers were paid as commissary of subsistence at Oak island, Major Blaney would be entitled to $65\frac{1}{10}$ months, at \$20 per month, (over and above all deductions,) amounting to \$1,302

At Cape Fear river Major Blaney served as commissary from the 3d quarter 1829, to 3d March, 1835, (over and above all accounts or deductions,) $65\frac{1}{10}$ months, at \$20 per month, .. 1,302

2,604

RD. BURGESS.

DECEMBER 18, 1856.

IN THE COURT OF CLAIMS.—No. —.

ON THE PETITION OF MARY E. D. BLANEY.

Brief of United States Solicitor.

The first item of claim is for interest. The settled principle that interest is not due from the government as an incident to a debt is thought not to be applicable to the case which it is sought to distinguish from the ordinary case of a balance ascertained to be due on settlement. The circumstance which is relied on to distinguish it is, that Major Blaney, major of engineers, in charge of public works at Cape Fear river and Oak island, on his death-bed gave a check on the Bank of the United States, at Fayetteville, North Carolina, in favor of his wife for \$2,438 12, where he had funds deposited to his account as follows :

Cape Fear river.....	\$1,762 99
Oak island.....	1,419 56—\$3,182 55;

which check the cashier of the bank refused to pay, but, under instructions from the Secretary of War, turned over the whole amount, \$3,185 55, to the Treasurer of the United States.

It is said that this is an appropriation of Blaney's private funds to the extent of the \$2,438 12. If that were true, it was not wrongful, for he had chosen to tangle items with what is admitted to be public money. But it was not private funds; only \$1,606 was allowed him afterwards. The amount was with him as a public officer, and on account of specific public objects, and although it turned out afterwards that he had a just claim to a portion of the money, he had no actual possession of it. It was deposited specially to his credit as an officer in the depository of public money.

It is true that the rightfulness of his claim was afterwards acknowledged, and it was ascertained by the decision in Gratiot's case that if he had actually drawn the money it could not have been recovered from him; but that fact does not entitle him to interest on it, nor is it perceived how the circumstance that he attempted to withdraw the amount from the fund standing to his own credit on special deposit, and did not succeed in getting the money, put the case on a different footing from a similar unsuccessful attempt, had the fund been to any other person's credit.

The money was treated by the bank and the Secretary as public money. This must be deemed right till the contrary appears. Part of it is admitted now by the petitioner to have been public money, and nothing is shown to rebut the presumption that it was all public money but the fact that so much money was allowed Blaney after the suit against Gratiot, and then the sum of \$1,606 51 was paid him. (See letter of Heyner, 15th March, 1847.)

II. *The claim for services in receiving and issuing subsistence, &c., for laborers, &c., on the public works at Cape Fear river and at Oak island.*

The regulations limit the allowance to subaltern officers and to issues to troops.

The authority of the case of Delafield is relied on to support this part of the claim; but as that case was affirmed on appeal by a divided court, but little weight can be given to the case, and it seems to me that the weight of reason is on the side of the usage of the department. The reason is not the same for allowing this to others as to subalterns, as the circuit court supposed, especially if the regulation applies to laborers employed by engineers, because the engineers in charge of the works are allowed \$2 per day for such work, for disbursement, &c., of funds appropriated to carrying on the work. Now, this subsistence is paid out of the appropriations, for the disbursement of which, and for the responsibility attending the purchases and care of articles purchased, the per diem is expressly given. What reason is there for distinguishing between the mode of compensation for money and services rendered in hiring men, and those provisioning them, particularly when no separate account is kept, but the whole is charged to the appropriations on account of the work on which the men are employed in an account rendered to the engineer department, and not in a separate account rendered to the subsistence department, as contemplated by the regulations on subject of allowance to assistant commissaries of subsistence?

It is manifest, indeed, that there is no application to the case of engineers in charge of public works, employing laborers under appropriations for specific works, keeping a single account with the work, in which everything paid out is charged to the work, of a regulation intended for troops when there are different appropriations and accounts of pay, subsistence, transportation, clothing, &c., &c. (See Regulations, 1,140. When appointment is to be reported to the commissary general, 1,173-'4.) Quarterly returns in this case not by commissary.

If an officer of engineers, besides the \$2 per day allowed him for disbursements on each fort or work, may charge as assistant commissary of subsistence for purchases of provisions furnished to his laborers, why will he not be permitted to charge as acting quartermaster also? He does the duties of this office as fully as he does those of commissary of subsistence. There is no reason for excepting these that there is not equally for excepting the commissary's charge. These are equally included in his duties, and alike covered by the allowance of \$2 per day. (See extract from Third Auditor's report, 4th April, 1845, 17th December, 1846, and January 5, 1847.)

There is no proof offered that Blaney actually issued the provisions. On the contrary, the accounts show that there were *men* employed and paid by the government for this purpose, and the account and return was made up by a clerk. The claim rests, therefore, altogether on the responsibility for disbursements.

The allowances to subalterns do not apply to this case, because they do not receive the per diem and come within the words of the regulations.

Major Blaney is neither within the letter nor reason of the allowance. But no number of improper allowances will authorize a court to allow others.

M. BLAIR, *Solicitor.*

ADDENDA TO RECORD 161.

ENGINEER DEPARTMENT,
Washington, December 14, 1846.

SIR: In reply to your letter of the 12th instant, I have to state that it appears from the records of this office that the late Captain Blaney, of the Corps of Engineers, did perform "service as commissary of subsistence" at both "the works in North Carolina under his superintendence," as follows, viz:

At fort on Oak island, (*Fort Caswell*,) from about the 24th of May, 1832, to May 15, 1835.

At work for improvement of Cape Fear river, from January 1, 1833, to May 15, 1835.

It appears also, from his accounts, that he received compensation for the performance of this service; that his accounts therefor were disallowed by accounting officers of the treasury, and that he refunded the amount to the United States.

Prior to the periods above stated, Captain Blaney was assisted in the superintendence of these works by officers of the army, by whom the duty of commissary was performed; and it appears from his accounts they received compensation for this service, but whether this compensation was allowed on settlement of Captain Blaney's accounts at the treasury is not certainly known in this department.

There were no orders issued to Major Blaney from this office "between the 1st of March and 15th May, 1835," that would entitle him to an allowance for transportation of baggage.

I am, very respectfully, your most obedient,

JOS. G. TOTTEN,
Col. and Chief Engineers.

Mr. RICHARD BURGESS, *Present.*

ENGINEER DEPARTMENT,
July 16, 1858.

I certify that the above and foregoing is a true copy from the records of this office.

H. G. WRIGHT,
Capt. of Eng., in charge.

This letter was written when the facts were fresh in the mind of the department. It is offered in evidence to prove that Major Blaney

was recognized as performing "the service as commissary of subsistence." The fact that he performed that service for a series of years anterior to May, 1832, is shown by his returns of provisions issued, on file with the papers in the case. It also shows that payments were made for like service at different periods to other officers at the same places, and, according to the decisions of the United States courts in Major Delafield's case, in all respects analogous, that the pay, &c., was to the officers who performed the duty, without regard to his rank. The claim of Mrs. Blaney would seem to be fully covered by these decisions.

RD. BURGESS.

I object to receiving this letter in evidence after the evidence on both sides has been closed and the case argued and submitted.

General Totten speaks of what appears from the records. On the part of the United States, we ought to have an opportunity to call for these records. Secondary evidence should not be received while the original records are within reach. Again, since this letter was written, (in 1846,) General Totten and the War Department have been called upon by this Court for all information in regard to this claim. We have the answers of both, and this letter can be of no use now except to contradict General Totten's last report, which should not be permitted at this stage of the proceeding when we have no opportunity to rebut it.

JNO. D. McPHERSON,
Deputy Solicitor.

MARY E. D. BLANEY, ADM'X, *vs.* THE UNITED STATES.

JANUARY 26, 1857.

To the honorable the Secretary of the Treasury:

You are requested to furnish to the Court of Claims, to be used as evidence in the above case, information whether there exists in the Treasury Department any evidence that Major George Blaney, of the Corps of Engineers, performed the duties of an assistant commissary of subsistence at the works for the improvement of Cape Fear river and the works at Oak island, between the last quarter of 1826 and the first quarter of 1835, both inclusive; and if so, for what portion of said period it is shown that he performed such duty, together with any other information in the Treasury Department tending to elucidate said claim.

TREASURY DEPARTMENT,
Third Auditor's Office, April 6, 1857.

SIR: The order of the Court of Claims of the 26th, and the letter of Samuel H. Huntington, esq., Clerk of said Court, of the 27th of

January last, addressed to your predecessor, the Hon. James Guthrie, relative to the case pending therein, of Mary E. D. Blaney *versus* The United States, I have the honor to return herewith. By the order of the Court, the Secretary of the Treasury is requested to furnish, to be used as evidence in the above cause, "information whether there exists in the Treasury Department any evidence that Major George Blaney, of the Corps of Engineers, performed the duties of an assistant commissary of subsistence at the works for the improvement of Cape Fear river and the works at Oak island, between the last quarter of 1826 and the first quarter of 1835, both inclusive; and if so, for what portion of said period it is shown that he performed such duty, together with any other information in the Treasury Department tending to elucidate said claim."

In reply, I have the honor to state that, from the records of accounts on file in this office, it appears that Major Blaney, during his life, several times made the charge of twenty dollars per month for extra services as issuing commissary to the laborers and other persons employed under his direction at each of the works at Cape Fear river and Oak island, North Carolina, which was as often disallowed by the accounting officers. The grounds for the disallowance were, that the same regulations of the engineer department which made it his duty to disburse the appropriations for the above works, required him to make "special quarterly returns of provisions purchased for the subsistence of the persons employed in the operations, embracing a quarterly return of the issues of the same, Form 5," as well as returns of all the materials used in the works; and for this additional service, *as a whole*, fixed an extra compensation, which Major Blaney has, under the regulations, already received.

Until the decision of the Supreme Court in General Gratiot's case, however, the regulations had been construed by the accounting officers to allow to an officer but a single per diem of two dollars, although he may have been in charge of a plurality of works, and such compensation only had been paid to Major Blaney; but afterwards his accounts were stated under said decision, and he was allowed two dollars per day for each work, or four dollars for both, for the entire period of his service between the 1st of January, 1826, and the 3d of March, 1835.

At the same time, and in addition to the above, a claim was preferred by Major Blaney's legal representatives of twenty dollars per month at each of the works, or forty dollars per month for both, "for his services doing the duty of assistant engineer in receiving, issuing, responsibility and accountability of the subsistence stores purchased for the work people employed," and at the two works within the same period, $69\frac{2}{10}$ months for Oak island, and $62\frac{1}{10}$ months for Cape Fear river, at twenty dollars per month for each, amounting to \$2,744. This charge was disallowed for the reasons before stated, and especially as the extra compensation for the service, as much a part of his duty as any other connected with the works, had been extended from two to four dollars per day for the whole time that it was allowable under the regulations and the decision in the Gratiot case.

As to the evidence asked for by the Court, that Major Blaney performed the duties of an assistant commissary of subsistence at the two works in question, the letter addressed by me to your predecessor on the 9th of May, 1856, in response to an inquiry of the Court of Claims and for the use of said Court, and a letter from me to John M. Brodhead, esq., Second Comptroller of the Treasury, of the 7th of January last, a copy of which is herewith,* contain all the information upon the subject that I can furnish.

I am, with great respect, your obedient servant,

ROBT. J. ATKINSON,
Auditor.

Hon. HOWELL COBB,
Secretary of the Treasury.

IN THE COURT OF CLAIMS.

MARY E. D. BLANEY, in her own right and as administratrix of George Blaney, deceased, *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

George Blaney, late a brevet major of the Corps of Engineers in the army of the United States, died on the 15th day of May, A. D. 1835. For a considerable period previous to his death he was the superintending engineer of the fortification at Oak island and of the improvement of Cape Fear river. At the time of his death the United States were indebted to him in a large sum of money; but his accounts were not settled at the Treasury Department until March, A. D. 1847. The delay was occasioned by the suspension of certain items till after the decision by the Supreme Court of the case of *Gratiot vs. The United States*, reported in 4 How. R., 80. The amount found due to him was paid to the petitioner on the 15th day of March, A. D. 1847, but without interest. It consisted (1) of a balance due him on his accounts as disbursing agent at Oak island and Cape Fear river; and (2) of a balance due him for pay and emoluments.

The petitioner alleges that her intestate acted as assistant commissary of subsistence at Oak island and Cape Fear river for the periods mentioned in her petition, and that he was entitled to compensation therefor at the rate of twenty dollars a month.

The petitioner claims (1) interest on the balances above mentioned; and (2) compensation for the services of her intestate as acting assistant commissary of subsistence.

(1.) As regards the claim for interest, this case is in no respect different from the case of *Samuel P. Todd vs. The United States*, recently decided by this Court. In each case the balance found due to the party grew out of his official relations with the United States. The claim for interest is, therefore, rejected.

(2.) Under the army regulations of 1825, the engineer superintending the construction of a fortification or other work was required to furnish to the engineer department "a special quarterly return of provisions purchased for the subsistence of the persons employed in the operations, embracing a quarterly return of issues of the same."—No. 391. The returns made by Major Blaney, as the superintending engineer at Oak island and Cape Fear river, in pursuance of this regulation, are the only evidence now offered that he performed the duties of assistant commissary of subsistence at those places, as alleged in the petition. But these returns, being made by Major Blaney in discharge of his official duty as superintending engineer, are no evidence that he also performed the duties of assistant commissary of subsistence. With the exception of the returns for the second, third, and fourth quarters of the year 1828 for Oak island, they are alike consistent with the fact that he was, and that he was not, acting assistant commissary of subsistence for the periods embraced by them. They, therefore, do not prove, or tend to prove, that he performed the duties of assistant commissary of subsistence, as alleged. The returns for the second, third, and fourth quarters of 1828 for Oak island are signed by Major Blaney, as captain of the Corps of Engineers and acting commissary of subsistence. But it was as superintending engineer alone that he was required to make the returns. The styling of himself, therefore, in his signature to them, acting commissary, was wholly unauthorized, and, at best, mere surplusage. It was certainly not evidence that he was acting commissary. Our opinion is, that this item of the petitioner's claim is unsupported by evidence.

We are of the opinion that the petitioner is not entitled to relief.

ALEXANDER M. CUMMING.

DECEMBER 7, 1858.—Reported from the Court of Claims, and committed to a Committee of the Whole House to-morrow.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents from the Post Office Department numbered from 1 to 13, exhibited as evidence in the case transmitted to the House of Representatives.
3. Depositions offered by the claimant, and numbered 1, 2, and 3, transmitted to House of Representatives.
4. Brief of claimant's counsel.
5. Brief of United States solicitor.
6. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said Court at Washington, this 7th day of December,
A. D. 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Court of Claims of the United States :

The petition of Alexander M. Cumming, of Princeton, Mercer county, New Jersey, respectfully represents that in the year 1836 he was a contractor for carrying the mails from New York to Philadelphia, in post coaches, on route No. 951, and carried such mail twenty-three days in the month of December of that year, the value of which service, according to the contract price, was \$700. Payment for the above service was demanded of and refused by the Postmaster General, on the ground that your petitioner's contract was annulled on the 8th of December, 1836; while your petitioner insists that it was not annulled until new schedules were furnished, and until

a new arrangement of the mails, which went into operation on the first day of January, 1837; and if his contract was annulled on the 8th of December, 1836, the direction of the Postmaster General, for your petitioner to "continue carrying the mails on 951 and 952 until otherwise ordered," operated as a new, or enlargement of the old contract, and authorized your petitioner to perform the service above mentioned, which he did in good faith, and for the public interests.

Your petitioner further represents that in the year 1836, he expended the sum of \$827 71, for forwarding the United States mails on route No. 951, during an unusually inclement season. That for several days, owing to the severity of the storm, the mails from the south did not arrive in Philadelphia, and the like delay of mails from the east existed at New York, which devolved on your petitioner such an extraordinary quantity of mails, as made it wholly impracticable for him to transport them by his teams, which were ample for his regular mails. That he performed the above service, and incurred the above expenses at the request of Colonel Page, postmaster of Philadelphia, and in obedience to the requirements of George Plitt, agent of the Post Office Department, whose directions were approved by the Postmaster General, as were the exertions of your petitioner, who received the strongest assurances of payment for his extraordinary expenses.

Your petitioner also represents that he made proposals for carrying the United States mails on routes No. 951 and 952, from Philadelphia to New York, for four years, with a deduction from each in case both were accepted. That both were accepted for four years, and one contract was annulled against his consent, at the end of one year; in consequence of which, he insists that he is entitled to receive the maximum payment in the contract which was continued and performed by him for the whole period.

Your petitioner also insists that, under his contract, he was entitled to carry the United States mail on the routes above mentioned until Congress authorized the carrying of the mails on railroads, in the month of July, 1838.

That in consequence of the annulling of his contract by the Postmaster General, your petitioner has sustained damage to the amount of \$15,750. An estimate of his damages, and proof thereof, will be made and furnished to the court before the final hearing on his petition.

Your petitioner further sheweth that his claims were presented at the General Post Office for adjustment, and disallowed by the Postmaster General and the Auditor of that office, as will appear by their decisions and the report of the said Auditor, dated February 19, 1842; and also by the First Comptroller of the Treasury, on an appeal to him from the decision of the auditor.

His claim was then presented to Congress, during the same year, and an adverse report made thereon, in the Senate, on the 5th of April, 1842.—(See Senate Doc. No. 219, 2d Sess. 27th Congress.) A favorable report was subsequently made upon a portion of his claim, in the House of Representatives, January 30, 1846.—(See House of Representatives Doc. 169, 1st Sess. 29th Congress.)

A joint resolution, predicated on said report, was subsequently passed; but it afforded your petitioner no relief, the word "equitably" in said resolution having been stricken out, and an unfavorable report made by the auditor of the Post Office Department. In the winter of 1854 he again presented his petition in the Senate, and it was referred to the Committee on Post Offices and Post Roads, but no definite action has since been had. Your petitioner being sole owner of said demands and alone interested therein, never having sold, assigned, nor transferred the same, or any part thereof, insists that his claims abovementioned should be paid by the United States, with interest thereon from the time when he was entitled to the same, and prays that a favorable report may be made by this honorable court in relation thereto, to the end that an act may be passed by Congress for his relief.

He refers to the papers on the files of Congress and General Post Office, and requests that his case against the United States may be placed upon the docket of claims presented to this court, and that a commission may be issued for the purpose of obtaining the testimony of George Plitt, of Philadelphia, Joseph Cunningham, of Trenton, New Jersey, John V. D. Joline, of Princeton, New Jersey, and Peter R. Stelle, of New York city, in support of the claims above mentioned.

Your petitioner further sheweth that the acceptance of his proposals, the contracts, and other papers and decisions referred to in this petition, are not in his possession, but are believed by him to be in the auditor's office of the Post Office Department; and your petitioner has caused application to be made to the General Post Office Department for a copy of said contracts; but the Second Assistant Postmaster General, in pursuance of a rule of the Postmaster General, has refused such copies without an order of this court for that purpose, for which order your petitioner now applies, and prays it may be granted.

Respectfully submitted.

ALEXANDER M. CUMMING.

PRINCETON, NEW JERSEY, *January* 15, 1856.

STATE OF NEW JERSEY, }
Mercer county, } ss.

On this twenty-fifth day of January, 1856, before the subscriber, a justice of the peace in and for said county, personally appeared Alexander M. Cumming, above named, and made oath in due form of law, that the facts stated in the above petition are true to the best of his knowledge and belief.

ALEXANDER M. CUMMING.

Sworn and subscribed this twenty-fifth day of January, A. D. 1856, before me.

AUGUSTUS L. MARTIN,
Justice of the Peace.

No. 1.

"I propose to transport the mail on route No. 951, from New York to Philadelphia daily, in postcoaches or suitable carriages and railroad cars with guards as advertised, for the yearly compensation of \$13,125. Or if my proposal for route No. 952 should be accepted, I will deduct twenty per cent. from the above amount of \$13,125.

"ALEXANDER M. CUMMING.

"OCTOBER 15, 1835."

I certify that the foregoing is a true copy of the proposal, recorded on one of the route books of this department, of A. M. Cumming, for conveying the mail on route No. 951, New York to Philadelphia, from January 1, 1836, to December 31, 1839.

In testimony whereof I have hereunto set my hand, and caused the
[L. s.] seal of the Post Office Department to be affixed, this 27th
May, 1856.

JAMES CAMPBELL,
Postmaster General.

No. 2.

R. F. Stockton agrees to carry the express mail and great mail consolidated in railroad cars, &c., for the lowest bid for an express mail, viz: \$14,000, added to the present cost of the great mail, \$10,500, conforming to the hours required by the department, and to carry into contract a bid for a second mail between New York and Philadelphia accepted at the last lettings at \$3,000, giving two daily mails between the two cities by railroad.

It is deemed the interest of the department to carry this proposition into contract.

A. K.

SEPTEMBER 16, 1836.

I certify that the foregoing is a true copy of a record on one of the route books of the Post Office Department for the year 1836, and that the annexed is a true copy of the acceptance of a proposal of A. M. Cumming for conveying the mail on routes No. 951 and 952, New York to Philadelphia, from January 1, 1836, to December 31, 1839, as recorded on one of the letter books of this department.

In testimony whereof I have hereunto set my hand, and caused the
[L. s.] seal of the Post Office Department to be hereto affixed,
this 27th May, 1856.

JAMES CAMPBELL,
Postmaster General.

POST OFFICE DEPARTMENT,
Northern Division, December 3, 1835.

SIR: The Postmaster General has accepted your proposal for transporting the mail on route No. 951 at \$13,125, with a deduction of twenty per cent., and on condition that in case any arrangement shall hereafter be made under the authority of Congress to carry the mail for the whole or any part of the route on railroad, then your contract to be annulled, or there shall be a *pro rata* deduction, as the case may be.

And he has also accepted your proposal for route No. 952 at \$9,990 per annum, with a deduction of ten per cent., and under the same condition as No. 951, to be run by Trenton, Princeton, Brunswick, Newark, &c.

Contracts and bond will be forwarded for your execution.

S. R. HOBBIE,
First Assistant Postmaster General.

A. M. CUMMING, Esq., *Newark, N. J.*

Nos. 3 and 4.

POST OFFICE DEPARTMENT, *April 16, 1856.*

SIR: I enclose herewith, for the use of the Court of Claims, and in compliance with its order of the 10th instant, certified copies of the contracts of A. M. Cumming for mail service on routes 951 and 952, New York to Philadelphia, from 1836 to 1839.

Prior to the passage of the act of July 2, 1836, "to change the organization of the Post Office Department," &c., all proposals for conveying the mail were required by law to be deposited in the office of the Comptroller of the Treasury; and as the service under these contracts commenced January 1, 1836, it is presumed the proposals were so disposed of; but on the route book two proposals of Mr. Cumming, dated October 15, 1835, are found recorded, copies of which are given, being those under which the contracts are made, and the department having no knowledge of any of the date of December 3, 1835, mentioned in the order of the Court.

Very respectfully, your obedient servant,

W. H. DUNDAS,
Second Assistant Postmaster General.

S. H. HUNTINGTON, Esq.,
Chief Clerk Court of Claims.

POST OFFICE DEPARTMENT.

I certify that the annexed is a true copy of a contract with Alexander M. Cumming for carrying the mail of the United States on route No. 951, from New York, New York, to Philadelphia, Pennsylvania, now on file in this department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the [L. s.] General Post Office, in the city of Washington, this 15th day of April, A. D. 1856.

JAMES CAMPBELL,
Postmaster General.

No. 3.

No. 951.—\$10,500—\$2,625.

This contract, made the twenty-seventh day of October, in the year one thousand eight hundred and thirty-five, between Alexander M. Cumming, of Newark, New Jersey, contractor for carrying the mails of the United States, of one part, and the Postmaster General of the United States, of the other part, witnesseth: that the said parties have mutually covenanted as follows, viz: The said contractor covenants with the Postmaster General—

1. To carry the mail of the United States from New York, New York, by Jersey City, New Jersey, Newark, Elizabethtown, Rahway, Methuen, New Brunswick, Kingston, Princeton, Trenton, Morrisville, Pennsylvania, Tulleytown, Bristol, Bridgewater, and Andalusia, to Philadelphia and back daily, in four-horse post coaches and railroad cars; mail coach to be limited to three outside passengers, and the mail to be accompanied on railroad by a guard provided at the expense of the contractor, on condition that in case any arrangement shall hereafter be made under the authority of Congress, to carry the mails for the whole or any part of the route on railroads, then this contract shall be annulled, or there shall be a *pro rata* deduction, as the case may be, at the rate of two thousand six hundred and twenty-five dollars for every quarter of a year during the continuance of this contract, to be paid by postmasters on the route above mentioned, or otherwise at the option of the Postmaster General, in the months of May, August, November, and February.

2. That the mail shall be duly delivered at and taken from each post office now established, or that may be established, on the route embraced in this contract; that it shall be conveyed on this route in the time specified in the annexed schedule, and in a secure and safe manner, free from wet or other injury, in a secure dry boot or box under the driver's seat if the mail is carried by stage or coach, or under a sufficient oil cloth or bear skin when carried on horseback or sulky, as herinbefore designated, or hereafter directed by the Postmaster General; that it shall be duly delivered into the post office at

the end of the route, and into the post office at the place at which the carrier stops at night, if one is there kept, and if no office is there kept it shall be locked up in some secure place, at the contractor's risk.

3. That if the contractor shall run a stage or other vehicle more rapidly or more frequently than he is required by the contract to carry the mail, he shall give the same increased celerity and frequency to the mail, and without increase of compensation.

4. That the contractor, if on a stage or coach route, shall, in the conveyance of passengers, give a preference to those who are brought in the connecting mail lines over those travelling in any other, so that connecting mail stage routes shall form continuous travelling lines.

5. That he shall not, by himself or his agent, transmit, or be concerned in transmitting, commercial intelligence by express, more rapidly than by mail.

6. That the contractor will, if required by the Postmaster General, collect quarterly of postmasters on said route, the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in his hands.

7. That in every case of failure to perform the trip, whatever may be the cause, there shall be a forfeiture of the pay for the trip, and a failure to arrive at a post office so long after the time set in the schedule as to lose the connexion with a depending mail shall be considered as equal to a whole trip lost; which forfeiture may be increased into a penalty not exceeding one hundred dollars, according to the circumstances under which the failure occurred.

8. That the contractor shall be subject for failure to take or deliver a mail or any part of a mail, for suffering the mail to be wet or otherwise injured, or lost, or destroyed, to a penalty of ten dollars, which may be increased to one hundred dollars, according to the size and importance of the mail, and the circumstances under which the failure occurred.

9. That a fine not less than a tenth part, and not exceeding the half of the price of a trip, may be imposed for each ten minutes' delay of the mail to arrive at the time specified in the schedule.

10. That the contractor shall be answerable for the persons to whom he shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through their unfaithfulness or want of care; and that he will discharge any driver or carrier of said mail whenever required to do so by the Postmaster General.

11. That the schedules being arranged so as to allow seven minutes to each post office for opening and closing the mails generally, and one hour to the distributing post offices, the Postmaster General is to have, nevertheless, the power of extending the time, on allowing the like extension to the contractor if he shall claim it.

12. That the Postmaster General may increase the speed and alter the times of arrival and departure fixed by the schedules, and alter the route, he making adequate compensation for any expense occa-

sioned thereby, not, however, to exceed the exact proportion of the original amount to the additional duties required.

13. That the Postmaster General may curtail the service or dispense with it entirely, he allowing one month's extra pay upon the amount deducted, in case he wishes to place on the route a higher degree of service than is contracted for, first offering the privilege to the contractor on the route of performing such higher service, on the terms that can be obtained; or whenever he shall deem it expedient to lessen the service, or to leave such route, or any part of it, out of operation, or to carry the mail by steamboat or railroad cars; provided that reduction of compensation in consequence of reduction of service shall not exceed the exact proportion which the service dispensed with bears to the whole service.

14. That the Postmaster General may annul the contract for repeated failures of the contractor to perform any of the stipulations of the contract; for violating the Post Office laws, or disobeying the instructions of the department; or for assigning his contract without the previous consent of the Postmaster General first obtained.

15. The said Postmaster General covenants with the said contractor to pay as aforesaid, at the rate aforementioned, quarterly, in the months of May, August, November, and February; provided always, that this contract shall be null and void in case the contractor or any person that may become interested in this contract, directly or indirectly, shall become a postmaster or an assistant postmaster. No member of Congress shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon; and this contract shall in all its parts be subject to the terms and requisitions of an act of Congress, passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

And it is mutually covenanted and agreed by the said parties, that this contract shall commence on the 1st day of January, 1836, and continue in force until the 31st day of December, inclusively, which will be in the year one thousand eight hundred and thirty-nine, unless the Postmaster General shall decide to terminate this contract on the 30th September, 1839, or the 30th June, 1839, which he has the right to do on forwarding six months' previous notice of his intention to determine this contract on one of those days.

In witness whereof, they have hereunto interchangeably set their hands and seals.

ALEX. M. CUMMING, [L. S.]

Signed, sealed, and delivered in the presence of—

P. ALLING. December 16, 1835.

This schedule subject to alteration by the Postmaster General, agreeably to the provisions contained in the twelfth section of the contract.

Leave New York every day at 5 p. m.

Arrive at Philadelphia next day by 5 a. m., or earlier if practicable.

Leave Philadelphia every day at 6 p. m.

Arrive at New York next day by 6 a. m., or earlier if practicable.

I, Alexander M. Cumming, being appointed a mail contractor, do swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the law in relation to the establishment of post offices and post roads within the United States; and I do solemnly swear that I will support the Constitution of the United States.

ALEX. M. CUMMING.

Sworn before the subscriber, a justice of the peace for the county of Essex, this sixteenth day of December, A. D. one thousand eight hundred and thirty-five.

STEPHEN DON,
Justice of the Peace.

Know all men by these presents that we, Alexander M. Cumming as principal, and William Stevens and Joseph C. Hornblower as securities, are held and firm bound unto the Postmaster General of the United States of America in the just and full sum of twenty thousand dollars, value received, to be paid unto the Postmaster General, or his successors in office, or to his or their assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the sixteenth day of December, in the year of our Lord one thousand eight hundred and thirty-five.

The condition of this obligation is such that, whereas the above bounden Alexander M. Cumming, by a certain contract bearing date the twenty-seventh day of October, in the year of our Lord one thousand eight hundred and thirty-five, covenanted with the said Postmaster General to carry the mail of the United States from New York to Philadelphia, as per contract annexed, commencing the first day of January, one thousand eight hundred and thirty-six, and ending the thirty-first day of December which will be in the year one thousand eight hundred and thirty-nine:

Now, if the said Alexander M. Cumming shall well and truly perform the covenants in the said indenture expressed on his part to be performed, and shall account for all penalties, and shall promptly repay all balances that may at any time be found due from him, then this bond is to be void, otherwise to remain in full force.

ALEX. M. CUMMING,	[L. S.]
WILLIAM STEVENS,	[L. S.]
JOS. C. HORNBLOWER,	[L. S.]

Signed, sealed, and delivered in the presence of—

P. ALLING. December 16, 1835.

POST OFFICE DEPARTMENT.

I certify that the annexed is a true copy of a contract with Alexander M. Cumming for carrying the mail of the United States on route

No. 952, from New York, New York, to Philadelphia, Pennsylvania, now on file in this department; and that the marginal and other entries in red ink, are true copies of orders and official statements duly made, modifying and affecting said contract.

In testimony whereof, I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the [SEAL.] General Post Office in the city of Washington, this fifteenth day of April, A. D. 1856.

JAMES CAMPBELL,
Postmaster General.

No. 4.

No. 952.—\$8,991—\$2,247 75.

This contract, made the twenty-seventh day of October, in the year one thousand eight hundred and thirty-five, between Alexander M. Cumming, of Newark, New Jersey, contractor for carrying the mails of the United States, of one part, and the Postmaster General of the United States of the other part, witnesseth: that the said parties have mutually covenanted, as follows, viz: The said contractor covenants with the Postmaster General—

1. To carry the mail of the United States from New York, New York, by Jersey City, New Jersey, Newark, Elizabethtown, Rahway, Methuen, New Brunswick, Kingston, Princeton, Trenton, Morrisville, Pennsylvania, Tullytown, Bristol, Bridgewater, and Andalusia, to Philadelphia and back daily, in four-horse post coaches and railroad cars, on condition that in case any arrangement shall hereafter be made under the authority of Congress, to carry the mails for the whole or any part of the route on railroads, then this contract shall be annulled, or there shall be a pro rata deduction, as the case may be, at the rate of two thousand two hundred and forty-seven and $\frac{75}{100}$ dollars for every quarter of a year during the continuance of this contract, to be paid by the postmasters on the route above mentioned, or otherwise, at the option of the Postmaster General, in the months of May, August, November, and February.

2. That the mail shall be duly delivered at, and taken from, each post office now established, or that may be established on the route embraced in this contract; that it shall be conveyed on this route in the time specified in the annexed schedule, and in a secure and safe manner, free from wet or other injury, in a secure dry boot or box under the driver's seat, if the mail is carried by stage or coach, or under a sufficient oil cloth or bear skin when carried on horseback or sulkey, as hereinbefore designated, or hereafter directed by the Postmaster General; that it shall be duly delivered into the post office at the end of the route, and into the post office at the place at which the carrier stops at night, if one is there kept, and if no office is there kept it shall be locked up in some secure place, at the contractor's risk.

3. That if the contractor shall run a stage or other vehicle more speedily or more frequently than he is required by the contract to carry the mail, he shall give the same increased celerity and frequency to the mail, and without increase of compensation.

4. That the contractor, if on a stage or coach route, shall in the conveyance of passengers give a preference to those who are brought in the connecting mail lines over those travelling in any other, so that connecting mail stage routes shall form continuous travelling lines.

5. That he shall not by himself or his agent transmit, or be concerned in transmitting commercial intelligence by express more rapidly than by mail.

6. That the contractor will, if required by the Postmaster General, collect quarterly of postmasters on said route, the balances due from them to the General Post Office, and faithfully render an account thereof to the Postmaster General in the settlement of quarterly accounts, and will pay over to the General Post Office all balances remaining in his hands.

7. That in every case of failure to perform the trip, whatever may be the cause, there shall be a forfeiture of the pay for the trip; and a failure to arrive at a post office so long after the time set in the schedule as to lose the connexion with a depending mail shall be considered as equal to a whole trip lost; which forfeiture may be increased into a penalty not exceeding one hundred dollars, according to the circumstances under which the failure occurred.

8. That the contractor shall be subject for failure to take or deliver a mail or any part of a mail, for suffering the mail to be wet or otherwise injured, or lost, or destroyed, to a penalty of ten dollars, which may be increased to one hundred dollars, according to the size and importance of the mail and the circumstances under which the failure occurred.

9. That a fine, not less than the tenth part, and not exceeding the half of the price of a trip, may be imposed for each ten minutes' delay of the mail to arrive at the time specified in the schedule.

10. That the contractor shall be answerable for the persons to whom he shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through their unfaithfulness or want of care; and that he will discharge any driver or carrier of said mail whenever required to do so by the Postmaster General.

11. That the schedule being arranged so as to allow seven minutes to each post office for opening and closing the mails generally, and one hour to the distributing post offices, the Postmaster General is to have, nevertheless, the power of extending the time on allowing the like extension to the contractor, if he shall claim it.

12. That the Postmaster General may increase the speed and alter the times of arrival and departure fixed by the schedule, and also the route, he making adequate compensation for any expense occasioned thereby; not however "to exceed the exact proportion of the original amount to the additional duties required."

13. That the Postmaster General may curtail the service or dis-

pense with it entirely, he allowing one month's extra pay upon the amount deducted, in case he wishes to place on the route a higher degree of service than is contracted for, first offering the privilege to the contractor on the route of performing such higher service on the terms that can be obtained; or whenever he shall deem it expedient to lessen the service, or to leave such route or any part of it out of operation, or to carry the mail by steamboat or railroad cars provided, that reduction of compensation in consequence of reduction of service shall not exceed the exact proportion which the service dispensed with bears to the whole service.

14. That the Postmaster General may annul the contract for repeated failures of the contractor to perform any of the stipulations of the contract; for violating the post office law, or disobeying the instructions of the department, or for assigning his contract without the previous consent of the Postmaster General first obtained.

15. The said Postmaster General covenants with the said contractor to pay as aforesaid, at the rate aforementioned, quarterly in the months of May, August, November and February.

Provided always, That this contract shall be null and void in case the contractor or any person that may become interested in this contract directly or indirectly, shall become a postmaster or assistant postmaster. No member of Congress shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon; and this contract shall in all its parts be subject to the terms and requisition of an act of Congress, passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

And it is mutually covenanted and agreed by the said parties, that this contract shall commence on the first day of January 1836, and continue in force until the 31st day of December, inclusively, which will be in the year one thousand eight hundred and thirty-nine, unless the Postmaster General shall decide to terminate this contract on the 30th September, 1839, or the 30th June, 1839, which he has the right to do on forwarding six months' previous notice of his intention to determine this contract on one of those days.

In witness whereof they have hereunto interchangeably set their hands and seals.

ALEX. M. CUMMING, [SEAL.]

Signed, sealed and delivered
in the presence of—

P. ALLING. December 16, 1835.

October 2.—Omit Sunday trip, at a reduction of \$1,714 per annum, until the further order of the department.

Postmaster at Philadelphia reports this order carried into effect October 8, 1837.

November 14, 1836.—It is ordered by the Postmaster General that contractor be offered an increased pay of \$3,009 on condition that he run a second daily line from New York to New Brunswick, carrying both mails on the East Jersey railroad, and also carrying the single

daily mail between Trenton and Philadelphia on the Trenton railroad, with permission to omit the Sunday trip at a pro rata reduction of pay, viz: \$1,714.

November 25, 1839.—Postmaster General directs that the term of this contract be extended to June 30, 1840.

This schedule subject to alteration by the Postmaster General, agreeably to the provision contained in the twelfth section of the contract.

Leave New York every day at 6 a. m. Arrive at Philadelphia same day by 6 p. m. or earlier if practicable.

Leave Philadelphia every day at 6 a. m. Arrive at New York same day by 6 p. m., or earlier if practicable.

Schedule adopted January 10, 1837.

Leave New York daily at 7 a. m. and 3½ p. m.

Leave New Brunswick by 7 a. m. and 2½ p. m.

Arrive at Philadelphia by 7 p. m.

Leave Philadelphia at 9 p. m.

Arrive at New York by 9 p. m.

July 17, 1837.

The Postmaster General allows Saturday night's mail to leave Philadelphia at 8 p. m. February 28, 1838, change schedule of second daily mail so as to leave New Brunswick early enough to take the 2 p. m. train from Newark to New York.

January 13, 1840.

Leave New York daily (except Sunday) at 7½ a. m.

Arrive at Philadelphia same day by 7½ p. m.

Leave Philadelphia daily (except Sunday) at 4 a. m., or earlier if the morning papers are in.

Arrive at New York same day by 4 p. m.

Second daily mail between New York and New Brunswick to be the same as heretofore.

March 19, 1840.

Leave New York daily (except Sunday) at 7½ a. m.

Arrive at Philadelphia same day by 7½ p. m.

Leave Philadelphia daily (except Sunday) at 9 p. m.

Arrive at New York next day by 9 a. m.

I, Alexander M. Cumming, being appointed a mail contractor, do swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the law in relation to the establishment of post offices and post roads within the United States. And I do solemnly swear that I will support the Constitution of the United States.

ALEXANDER M. CUMMING.

Sworn before the subscriber, a justice of the peace for the county of Essex, this sixteenth day of December, anno Domini, one thousand eight hundred and thirty-five.

STEPHEN LORD,
Justice of the Peace.

Know all men by these presents, that we, Alexander M. Cumming as principal, and William Stevens and Joseph M. Hornblower as securities, are held and firm bound unto the Postmaster General of the United States of America in the just and full sum of fifteen thousand dollars, value received, to be paid unto the Postmaster General, or his successor in office, or to his or their assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the sixteenth day of December, in the year of our Lord one thousand eight hundred and thirty-five.

The condition of this obligation is such that, whereas the above bounden Alexander M. Cumming by a certain contract bearing date the twenty-seventh day of October, in the year of our Lord one thousand eight hundred and thirty-five, covenanted with the said Postmaster General to carry the mail of the United States from New York to Philadelphia, as per contract annexed, commencing the first day of January one thousand eight hundred and thirty-six, and ending the thirty-first day of December which will be in the year one thousand eight hundred and thirty-nine:

Now, if the said Alexander M. Cumming shall well and truly perform the covenants in the said indenture expressed on his part to be performed, and shall account for all penalties, and shall promptly repay all balances that may at any time be found due from him, then this bond is to be void, otherwise to remain in full force.

ALEX. M. CUMMING,	[SEAL.]
WILLIAM STEVENS,	[SEAL.]
JOSEPH C. HORNBLOWER.	[SEAL.]

Signed, sealed and delivered
in presence of—

P. ALLING. December 16, 1835.

No. 5.

AUDITOR'S OFFICE, POST OFFICE DEPARTMENT,
November 19, 1841.

SIR: A. M. Cumming has submitted a claim against the Post Office Department to audit and allow, amounting to \$3,496 50, or the balance that may be due said Cumming on route No. 952, (old service, New York to Philadelphia,) as set forth in the statement. If

the Post Office Department is in possession of any papers or information necessary for me to obtain to a full and perfect understanding of the facts, I will thank you for them.

Most sincerely, yours,

E. WHITTLESEY.

S. R. HOBBIE, Esq.,

First Assistant Postmaster General.

No. 6.

A. M. Cumming's Case.

AUDITOR'S OFFICE, POST OFFICE DEPARTMENT,
December 6, 1841.

The Postmaster General in 1835 advertised mail routes Nos. 951 and 952, from New York to Philadelphia, inviting proposals for contracts to transport the mail on them from January 1, 1836, to the 31st of December, 1839, unless he should terminate the contracts the last of June or September.

A. M. Cumming offered proposals for both routes which were accepted. His proposal for route 952 was as follows: "I propose to transport the mail on route 952, from New York to Philadelphia, as advertised, in four-horse post coaches and railroad cars, for the yearly compensation of \$9,990; or, if my bid for route No. 951 is accepted, I will deduct 10 per cent. from the above amount of \$9,990." He was notified of the acceptance of his proposal in the following words:

"And he (the Postmaster General) has also accepted your proposal for No. 952 at \$9,990 per annum, with a deduction of ten per cent. and under the same condition as No. 951, to run by Trenton, Princeton, Brunswick, Newark, &c."

Contracts were signed by the parties on the 27th day of October, 1835, containing in addition to the usual stipulation in the first article the following, after describing the route, the number of trips, and mode of conveyance, which is the condition referred to in the acceptance, to wit: "On condition that in case any arrangement shall hereafter be made under the authority of Congress to carry the mails for the whole or any part of the route on railroad, then this contract shall be cancelled, or there shall be a pro rata deduction, as the case may be."

A contract was signed also to carry the mail on route 951. The mail was transferred on the last mentioned route until January 1, 1837. The department having made a contract with the railroad company that superseded the service on 951, the contract with Mr. Cumming for that route was annulled and he was allowed \$3,009 to perform extra service on route 952, leaving the compensation for the regular service on this route at \$8,971, the contract price, that being the sum contained in the proposal after deducting ten per cent. from \$9,990, in consideration of having a contract for route 951. Having heard that the Postmaster General contemplated to annul one of the

contracts, Mr. Cumming, on the 16th of September, 1836, remonstrated against the measure and set forth its ruinous consequences to him if it should take place. Soon after the contract for route No. 951 was annulled, Mr. Cumming applied to the Postmaster General to pay him for the regular service on route No. 952 the annual compensation of \$9,990, the sum contained in the proposals, if route No. 951 should not be assigned to him.

Mr. Hobbie, 1st Assistant Postmaster General, on the 10th of June, 1837, communicated the decision of Mr. Kendall, then Postmaster General, in the following words: "No allowance can be made of the ten per cent. claimed; the Postmaster General considers himself inhibited by the provisions of the act of 1836 from making such allowance." A renewed application was made by M. St. Clair Clarke, on behalf of Mr. Cumming, for the ten per cent. deduction on \$9,990 during the continuance of the contract, after the service on route 951 was dispensed with, amounting to \$3,496 50, which was rejected by Mr. Niles on the 3d of March, 1841, in the following decision: "The subsequent action of the department in curtailing or annulling the contracts or either of them, cannot affect the original terms of the contract not annulled."

Failing to obtain relief at the hands of the Postmaster General mentioned, application was made to the Auditor for the Post Office Department by Mr. Dow, agent for Mr. Cumming in his letter dated October 18, 1841. Although an early consideration of the subject was then asked, and has been repeated since, I have been prevented from examining it by circumstances beyond my control until the present time. A report is demanded of the Auditor in favor of Mr. Cumming for \$3,496 50 or the balance that may be due on route No. 952, as set forth in a case stated on the 6th of June 1841. The first inquiry naturally presented by the fact that the claimant has applied to two Postmaster Generals for relief is, has the Auditor the legal power to comply with the demand?

In the eighth section of the act approved July 2, 1836, it is made the duty of the Auditor, "to receive all accounts arising in the said Department, or relative thereto, to audit and settle the same, and certify their balances to the Postmaster General."

So far as mail contractors are concerned their accounts must arise from contracts between them and the Postmaster General. The Auditor cannot legally make any contract, nor give damages for the breach of a contract made by the Postmaster General, nor change, alter, or modify one that he has made.

In the eleventh section it is made the duty of the Postmaster General within sixty days after the making of any contract, to cause a duplicate thereof to be lodged in the office of the Auditor of the Post Office Department.

I am asked as Auditor to go behind the contract of October 27, 1835, and look at the proposal and acceptance and determine from them what the intention of the parties was when they were negotiating with each other relative to the terms of a contract for transporting the mail on route 952; but the proposal nor acceptance is

officially before me, and I cannot under the law look into them to form an opinion from them as to the intention of the parties. The contract, it appears, from a duplicate filed in this office, is explicit, and defines in language unambiguous the terms of an agreement. If I was satisfied that there was a mistake, I could not correct it.

The Auditor is not clothed with chancery powers, and he is restricted more than once by the act of July 2, 1836, to acts warranted by law.

Mr. Cumming having received all the money for transporting the mail on route No. 952 that the Postmaster General agreed to pay him by the contract referred to, as the same appears by a duplicate filed in this office, I decide, I cannot, without violation of law, report that Mr. Cumming has a legal claim to the money demanded, nor to any part of it.

Very respectfully, your obedient servant,

E. WHITTLESEY,
Auditor.

No. 7.

A. M. Cumming's case for extra compensation for carrying the mail on route 951, in the month of January, 1836.

AUDITOR'S OFFICE, POST OFFICE DEPARTMENT,

February 19, 1843.

The claimant presents an account, amounting to \$827 71, for money expended in forwarding the mails during an unusually inclement season. He says, and it is confirmed by Mr. Plitt, then a special mail agent, that the mails from the south did not arrive, at periods, for two or three days in succession at Philadelphia, and that the like delay of the mails from the east existed at New York, which devolved upon Mr. Cumming such an extraordinary quantity of mails as made it wholly impracticable for him to transport them by his means, which were ample for the regular mails; and that he incurred the above mentioned expense in obedience to the requirement of Mr. Plitt, whose directions were approved, as were also the exertions of the claimant.

It appears from letters from Plitt and from Page, then postmaster at Philadelphia, that Mr. Cumming was prompted to use extraordinary exertions to carry the mails thus accumulated, under strong assurances that he should be remunerated for his extraordinary expenses.

“The account was submitted to Mr. Kendall on the regular vouchers; and on the 28th of September, 1836, he made the following decision: The contractor exerted himself in a manner highly creditable to get his mails through; but as he effected no more than he was bound to do by his contract, the Postmaster General has no legal authority to allow him any additional compensation.

“ Contractor was bound to carry the mail from Philadelphia to New York, embracing, of course, all the mails which came in at intermediate points. The Owego mail connected with his at the Newark office, and from that office, and of course it was a part of his service to take it to and from that office. The railroad is not known in his contract.

“ A. K.

“ SEPTEMBER 28, 1836.”

Afterwards, on the 29th of October, 1836, it was brought before the Auditor, with other claims; and, as to the latter, he reported in his favor \$4,734 93; and to this claim he says, “ your claim for extra compensation appears to have been disallowed by the Postmaster General on the 28th ultimo, in a decision which he recites. If the claim was of the kind that the Auditor was empowered to decide, he virtually adopted the decision of the Postmaster General and made it his own, and thereby rejected the claim; but, in my opinion, the Auditor cannot legally act on the merits of the claim, or order of the Postmaster General, or for services which he recognizes under his contract or order.

The claim was presented to Mr. Niles, and on the 3d of March he wrote as follows; “ Proof is insufficient to show that the sum claimed has been actually expended, or to show what, in fact, was expended in performing the extraordinary service charged for.

“ J. M. N.

“ MARCH 3, 1841.”

It is contended by the claimant that this was re-opening the case; that no decision was made on its merits, because the vouchers were destroyed by the fire in December, 1836, which are now supplied by copies, with the exception of vouchers to cover about \$50 of the claim. With this secondary testimony the claim was submitted to the present Postmaster General, who said, “ this case having been decided by a former Postmaster General, I have no power to reverse that decision. December 9, 1841,” &c.

This decision is based on the opinion of the Attorney General. The case is submitted to me as Auditor under the circumstances and facts mentioned, and, after full consideration of them, I decide—

1st. That the claimant is concluded by the decision of Mr. Kendall.

2d. That if it were otherwise, inasmuch as the claim is for extraordinary services, not provided for in any contract or order of the Postmaster General, nor for services which he has recognized, I am not by law empowered to allow the claim, nor any part of it.

Most sincerely, &c ,

E. WHITTELSEY,
Auditor

No. 8.

Case of Mr. A. M. Cumming, contractor for carrying the United States mail on route No. 952, from New York to Philadelphia.

COMPTROLLER'S OFFICE,
February 16, 1842.

From two letters of the Auditor of the Post Office Department, dated December 6 and 10, 1841, a copy of the contract and other papers relating thereto, the following facts appear:

Proposals were invited for said route, 952, as also for route 951, being a parallel route to 952.

On the 15th October, 1835, Mr. Cumming made two proposals for carrying the mail on these routes. On route 952 for \$9,990 per annum, in four-horse post coaches and railroad cars; or, if his bid for route 951 is accepted, he will deduct 10 per cent. from the above. On route 951 he proposes to carry the mail for \$13,125 per annum, or if his bid for route 952 is accepted, he will "deduct 20 per cent. from the above,"

On the 3d December, 1835, the Assistant Postmaster General advised Mr. Cumming that both bids had been accepted, subject to the deduction in each case, as proposed.

The contract for route 952, the only one before this office, bears date *October 27*, 1835, (before the notice to Mr. Cumming that his bid was accepted,) and to take effect from the 1st January, 1836, and which contains a "condition that in case any arrangement shall hereafter be made under the authority of Congress to carry the mails for the whole or any part of the route on railroads, then this contract shall be annulled, or there shall be a pro rata deduction, as the case may be."

The first act of Congress authorizing the United States mail to be carried on railroads was approved July 7, 1838. The 13th section of contract for route 952 authorizes the Postmaster General to "curtail the service, or *dispense with it entirely*, he allowing *one month's extra pay* upon the amount deducted, in case he wishes to place on the route a higher degree of service than is contracted for," &c.

On the 6th December, 1836, contract for route 951 was annulled, to take effect after December 31, 1836, and Mr. Cumming received the one month's extra pay, (he having, on the 16th September preceding, remonstrated against the annulment, which he was informed the department intended.)

On the 14th November, 1836, the Postmaster General ordered that the contractor be offered an increase pay of \$3,000 upon route 952, on condition that he run a second daily line from New York to New Brunswick, &c. This was accepted by Mr. Cumming; and by a letter of June 10, 1837, to him from the First Assistant Postmaster General, the following decision of the Postmaster General was communicated:

"The order of December 6, annulling the contract, (for route 951,) was a countermand of the service, which should be paid for only to

the time of its receipt, say the 8th of December, the month's extra pay being allowed to cover the loss of the change." The pay for the new arrangement may commence from the 8th December, 1836.

In consequence of the annulment of contract for route 951, Mr. Cumming applied to the Post Office Department for the 10 per cent. on 952, agreeably to his *proposal*, and which he states had been deducted therefrom in making the contract. On the 10th June, 1837, the Assistant Postmaster General informed him that "the claim for restoration of the 10 per cent. on 952 is not allowed by the Postmaster General, conceiving himself wholly inhibited by the provisions of the act of 1836 from doing it."

Another application was made for an allowance of this 10 per cent. to the Auditor of the Post Office Department on the 18th October, 41, by Jesse E. Dow, esq., agent for said Cumming; and on the 6th December following the same was also disallowed by the Auditor. An appeal is now made to this office under the act of July 2, 1836, which directs the Auditor of the Treasury for the Post Office Department to receive all accounts arising in the said department, or relative thereto, to audit and settle the same, and certify their balances to the Postmaster General, *provided*, that if either the Postmaster General, or any person whose account shall be settled, be dissatisfied therewith, he may, within twelve months, appeal to the First Comptroller of the Treasury, whose decision shall be final and conclusive."

As regards the claim now made I would remark, that whatever may have been the intention or understanding of Mr. Cumming in making his proposals, and which include certain conditions to his contracting for carrying the mail on the above route, no reference is made to those conditions in the contract which he made with the Post Office Department, and by which he unconditionally agrees that the Postmaster General has the right to "curtail the service, or dispense with it entirely, he allowing one month's extra pay upon the amount deducted." This extra pay having been received by Mr. Cumming for loss of service on route No. 951, his compensation for said loss, I am of opinion, has been fully paid agreeably to the terms of the contract.

Mr. Dow contends that the proposals made by Mr. Cummings should be considered by this office in connexion with the contract, in order to show the intention of the parties. In this I do not concur, but am of opinion that the act of 1836 does not authorize the Comptroller to go behind a written agreement, which, as in this case, is specific in its terms, in order to ascertain the merits of a claim presented for his action.

Whatever, therefore, there may be of equity in this claim of Mr. Cumming, no further allowance can be made by this office than has been already made by the Post Office Department.

The papers which accompanied your letter are herewith returned.

Very respectfully, your obedient servant,

J. N. BARKER,
Acting Comptroller.

E. WHITTLESEY, Esq.,
Auditor Post Office Department.

No. 9.

A. M. Cumming's case for pay for transporting the mail on route No. 951, from the 8th day of December, 1836, to January 1, 1837.

AUDITOR'S OFFICE, POST OFFICE DEPARTMENT,
February 19, 1842.

I am not aware that there are any grounds for controversy between the claimant and the department as to the facts in this case, except as to the time when the order of the 6th of December, 1836, was intended to, and did, take effect. It is agreed that Mr. Cumming was a contractor on route No. 951, from New York to Philadelphia, by a contract in the usual form, in which the Postmaster General reserved the power to dispense with a part, or with the whole service; that he did dispense with the further service by an order dated December 6, 1836; and that Mr. Cumming was paid for services performed to the 7th of December, 1836, inclusive.

A statement of facts was submitted to Mr. Kendall by the contract office, which will be copied so far as relates to route No. 951, and to the question submitted, to wit: "By letter dated December 6, 1836, Mr. Cumming was informed that his contract for No. 951 was annulled, a contract having been made with the Camden and Amboy Railroad Company to transport the great mail between New York and Philadelphia, and the arrangement made with him for the improvement on No. 952, supplying certain offices that depended on No. 951. The pay on No. 951 was stopped on 7th December, 1836; the schedule for the new arrangement bears date 21th December, 1836. Mr. Cumming contends that the letter of 6th December conveyed to him no instructions to discontinue the service on 951, and that he therefore continued till the close of the year, or until he received the new schedule of December 27, which alone he considered as authority to discontinue the old and commence the new arrangement. He insists that his pay on No 951 be continued to 31st December last. The only certificates on file, specific as to dates, are from the postmasters at Newark and New Brunswick, in which they state that they received two mails a day from Philadelphia, until the 1st of January, and since, but one mail a day."

The application for pay for the service performed between the 8th and 31st of December, inclusive, having been submitted to Mr. Kendall, he decided as follows, to wit: "The order of December 6th, annulling the contract, was a countermand of the service, which should be paid for only to the time of its receipt, say the 8th of December, the month's extra pay being allowed to cover the loss of the change.

"A. K.

"JUNE 8."

The mail register sent from Philadelphia confirms the certificates from the postmasters at Newark and New Brunswick that the mail was carried on route No. 951 until the 1st of January, 1837, notwith-

standing the order of the 6th of December, 1836, annulling the contract on that route.

The subject of difference is this : when did the order of December 6th take effect ? Mr. Kendall said it took effect as soon as it was made known to Mr. Cumming, which he supposed was on the following day. Mr. Cumming contends it did not take effect until the new schedule was delivered to meet the new arrangement, by which the service on route No. 951 was suspended. Mr. Kendall, upon the order itself to justify the decision he made, and Mr. Cumming relies upon a postscript to Mr. Hobbie's letter of November 14, 1836, as his authority for continuing to carry the mail until the 1st of January, 1857, and upon the fact that a new schedule was absolutely necessary to carry the new arrangement into effect, which was not made out until the 27th of December, and until that time, that the old agreement on both routes was in full force and effect.

The Postmaster General, by Mr. Hobbie, proposed to Mr. Cumming on the 14th of November, 1836, to increase his pay \$3,000 for a second daily line from New York to New Brunswick, carrying both mails, that and No. 952, on the East Jersey Railroad, and also carrying the single daily mail on No. 952, between Trenton and Philadelphia, on the Trenton Railroad, with permission to omit the Sunday trip, at a pro rata reduction of pay, viz : \$1,714, and in a postscript he said : "You will continue carrying mails on 951 and 952 until otherwise ordered."

Mr. Cumming gave a practical demonstration of what he supposed was his duty, by continuing to carry the mail until the new arrangement superseded the contract by a change of schedule, which bears date the 27th of December. It does not appear that the postmasters at the termination of route No. 951 were officially notified of the new arrangement until the schedule was changed, but the mail was delivered by them to Mr. Cumming, and by him carried as it had been before the order of the 6th of December.

Mr. Cumming again brought the subject of this claim before the Postmaster General, by his letter addressed to Mr. Hobbie, on the 2d of December, 1841, and on the 9th of December, 1841, Mr. Wickliffe disposed of it as follows : "The claim having been presented and rejected by a former Postmaster General, I do not feel myself at liberty to revise and reverse his decision.

"C. A. WICKLIFFE."

The Attorney General, in a case submitted to him, decided that when a former Postmaster General had disposed of a claim on its consideration, that his successor was not authorized to open the case and examine it again.

Failing to obtain relief on application to Mr. Kendall and to Mr. Wickliffe when Postmaster General, Mr. Cumming applied to me, as Auditor of the Treasury for the Post Office Department, to audit his claim, and to allow him \$700 for the service mentioned.

I have decided in the case of J. M. Sherwood, and in the case of Thomas A. Staples, that when a claimant has submitted his claim to

the Postmaster General he must abide by the decision he has made, and that an appeal does not lie to this office. These decisions will be adhered to until I am convinced they are erroneous.

The claimant has the right, in common with all others, to apply to Congress for relief when the accounting officers reject their claims; and it appears to me that it is doubtful whether the department can charge an old claim upon the present appropriation.

There is another feature of this case which I will notice. This office acts on contracts made by the Postmaster General and upon orders he gives, which may originate a claim. The Auditor is to be placed in possession of both by their being filed in this office. The order of the 6th of December, 1836, was so filed, and by its terms the contract for route 951 was annulled from that day, and therefore ceased to exist. The claimant relies upon the postscript to Mr. Hobbie's letter, of November 14, 1836, as his authority for continuing this service. Without determining whether the order of December 6 did not render void any previous order as well as the contract, I find that neither said letter nor the postscript was ever reported to this office, and not having been reported I cannot, under the act of July 2, 1836, act upon it although the letter is before me.

In consideration of the foregoing premises, I decide—

1st. That the claimant having submitted his claim to the Postmaster General and obtained his decision, is bound by it unless he obtains relief in Congress.

2d. That the order of December 6, 1836, annulled the contract for transporting the mail on route No. 951 from and after the 7th, when Mr. Cumming was notified of its existence; and there being no contract in existence for transporting the mail on said route, nor order in this office recognizing any service after that day, that the claimant has not established his right by such proof as is required by the act of July 2, 1836, to authorize and empower me to audit and allow him any further compensation.

E. WHITTLESEY,
Auditor.

No. 10.

AUDITOR'S OFFICE, POST OFFICE DEPARTMENT,
September 30, 1848.

On the 18th February, 1847, a joint resolution was passed, directing the Auditor of the Treasury for the Post Office Department to *examine* and *audit* the claims of Alexander M. Cumming, late mail contractor on routes 951 and 952 between Philadelphia and New York, between the years 1835 and 1839, and making it the duty of the Postmaster General to pay said Cumming the balance (if any) that may be justly and legally due him, under the contracts and orders from the

department and its agents, out of the current appropriation for mail transportation.

The original resolution was reported on the 30th of January, 1846, accompanied by a report from the Committee on Post Offices and Post Roads, in which two distinct claims on the part of Mr. Cumming are set forth within the period mentioned. The resolution so reported provided for the payment of the balance, if any, that may be justly and *equitably* due to Mr. Cumming ; but the resolution was amended and passed in the form above recited, so as to pay the balance, if any, which might be justly and legally due.

The two claims set forth were severally presented, in the first instance, to the successive Postmasters General, Messrs. Kendall, Niles, and Wickliffe, and were afterwards presented to my predecessor, Elisha Whittlesey, esq.

In the claim for continued service on route No. 951 Mr. Whittlesey decided, among other things, February 19, 1842 :

“That the claimant having submitted his claim to the Postmaster General and obtained his decision is bound by it, unless he obtains relief from Congress.”

And in the claim for extra service, in consequence of accumulation of mails :

1. “That the claimant is concluded by the decision of Mr. Kendall.

2. “That if it were otherwise, inasmuch as the claim is for extraordinary services not provided for in any contract or order of the Postmaster General, nor for services which he has recognized, I am not by law empowered to allow the claim, or any part of it.”

These quotations, as well as the decisions of Mr. Whittlesey at large, show that he did not decide, or indeed express any opinion, upon the merits of the claims.

From these facts it appears to me : 1st. That it was the design of the resolution, as passed, merely to remove the difficulty stated by Mr. Whittlesey, and to authorize a settlement of the claims by this office as an original question.

2d. That it was not its design to create any new rule for such settlement, but that it should be made upon the principles of law and justice, as they are applied to the accounts of all other contractors and other agents of the department.

No implication can be raised, from the mere passage of the resolution, that Congress considered the claimant had any just demand on the United States. The language “to pay the balance due, if any,” is abundant to show that Congress did not choose to decide that question.

The first claim to be considered is for continued service on route No. 951, from the 8th to the 31st December, 1836—23 days, at \$2,625 per quarter, making \$656 25.

The claimant entered into contract with the Department for carrying the mail on this route from Philadelphia to New York, from 1st January, 1836, to 31st December, 1839. This contract was intended for the conveyance of the great eastern mail. The schedule time of per-

forming the trip was twelve hours, and the contractor was limited to three outside passengers, the whole of the stage being reserved for the mail, which was to be provided with a guard. The contract contained also the following stipulation: "In case any arrangement shall hereafter be made under the authority of Congress to carry the mails for the whole or any part of the route on railroads, then this contract shall be annulled, or there shall be a pro rata deduction, as the case may be."

For the same period the claimant entered into contract for route No. 952, over the same ground, the schedule time of the trip being eighteen hours, and the route being intended for carrying the way mails and mail matter not demanding celerity of transit.

The contingency contemplated in the contract for route 951 arose in November, 1836. The department entered into an arrangement with the Camden and Amboy Railroad Company for carrying the great mail from and after the fifteenth of that month.

On the 14th November, 1836, Major Hobbie made a proposition to Mr. Cumming for an improvement of service on route 952, rendered necessary by the transfer of the great mail, and offered him an increased compensation of \$3,000 per annum for such improvement, and in a postscript to his letter says: "You will continue carrying mails on routes 951 and 952 until otherwise ordered." This postscript seems to be the sole authority for this claim; but I understand it to have been intended merely to guard against Mr. Cumming hastily discontinuing route No. 951 in consequence of the transfer of the mail to the Camden and Amboy company agreeably to the stipulation recited in the contract, and to keep route No. 951 alive for the intermediate mails until the new arrangement designed by his proposition should be agreed upon.

On the 6th December, 1836, Major Hobbie notified Mr. Cumming of the annulment of the contract as follows:

"SIR: An arrangement having been made with the Camden and Amboy Railroad Company for the conveyance of the great mail between New York and Philadelphia, and you having accepted the offer of the department for an improvement on route No. 952, which will supply certain of the towns in New Jersey with the mail, for which they depended on route No. 951, the Postmaster General has directed that your contract on route No. 951 be annulled and that you be allowed one month's extra pay.

"I am, respectfully, your obedient servant,

"S. R. HOBBIE."

I consider this notice as full and ample as the occasion required, and that, no time being specified therein, the annulment took effect from the date, or at least from the date when it should have been received by Mr. Cumming, by due course of mail, which was the 7th December, 1836, and that the service then legally and properly ceased.

The quantity or weight of mail is a matter of no moment in railroad service. Upon the arrangement being made with the Camden and

Amboy Railroad Company, the great burden of the mail was removed from Mr. Cumming, whether on route 951 or 952. All the through mail was, of course, carried upon it, and nothing was left for Mr. Cumming but the mail to and from the intermediate offices. It is a mistake, therefore, to suppose that Mr. Cumming continued *the service* on 951 after the 7th of December, 1836; in fact, he had ceased to carry the great mail, as well as a portion of the mail usually sent on 952, from the 15th of November, although he continued to be paid for both precisely as if he had carried the two entire mails to the former day, with the addition of one month's extra pay, which I think the Postmaster General might well have withheld under the stipulation in contract 951, before recited, if he had thought proper so to do.

Another fact is to be stated: that Mr. Cumming has been credited and paid the amount offered and accepted for the improved service on 952, to wit: \$3,000 per annum from the 8th of December, 1836, inclusive, the day following Major Hobbie's order of annulment. So that the allowance of this claim would give him, not only the pay of the great eastern mail from the 8th of December, after its transfer to the railroad, but the pay for the improved service on 952 rendered necessary by that transfer.

The second claim set forth is for extra compensation for carrying the mail on the before mentioned route, No. 951, soon after the commencement of the contract, to wit: in the month of January, 1836. The facts in this case are fully presented in the report of Mr. Whittlesey, before mentioned, of February 19, 1842, to which I refer. I may here state that the original vouchers which Mr. Whittlesey therein supposed to have been destroyed by fire in December, 1836, have since been found, upon making a systematic arrangement of the books and papers in my office, and are now before me. I may also observe that these vouchers are not, in my opinion, sufficient of themselves to prove the amount expended for the object alleged. They embrace the period between the 6th and the 22d of January, 1836, but they do not show, nor is there any other evidence, that the charges were wholly for carrying mails which had accumulated at either end of the route; many of the charges are simply for carrying mails for short distances, keeping horses, drivers, &c. The bill of Thomas Cornwall contains items prior to the 7th of January, which Mr. Cumming does not charge, of a similar character to those after that day, which he does charge. The reason of the distinction between the two does not appear; these omissions may be mere defects of proof which may be supplied, and I think ought to be supplied, before any allowance should be made upon them. At present the question is a matter of principle independent of any proof of extra service. The language of the contract is that the contractor "is to carry the mail of the United States." It is without limitation or qualification, and necessarily includes the whole mail, of whatever description, which may, at the time of departure, be in the post office for transmission. Instances of double mails to be forwarded, in consequence of the failure of a mail in a connecting line from floods, storms, or

accidents, have been of constant occurrence in the department, without furnishing ground for additional compensation to the contractor. The accumulation in Mr. Cumming's case may have been greater than usual, but the excess does not affect or vary the principle.

If Mr. Cumming was bound to carry the mail, which I consider that he was by the terms of the contract as well as the practice of the department, the unauthorized orders of Mr. Plitt or Mr. Page could not raise for him any additional ground for compensation.

I am therefore of opinion that, under the terms of the joint resolution, Mr. Cumming can take nothing on account of this claim, nor on account of the first mentioned claim, for continued service in December, 1836.

P. G. WASHINGTON, *Auditor.*

No. 11.

POST OFFICE DEPARTMENT,
Contract Office, February 12, 1857.

SIR: After examination it does not appear that any contract was ever executed by the railroad company for transporting the United States mail, on route No. 951—New York to Philadelphia—between the 1st of January, 1836, and 31st of December, 1839.

Very respectfully, your obedient servant,

WM. H. DUNDAS,
Second Assistant Postmaster General.

DANIEL RATCLIFF, Esq.,
Assistant Solicitor Court of Claims, Washington.

No. 12.

POST OFFICE DEPARTMENT,
Contract Office, January 27, 1857.

SIR: By a resolution of Congress of February 18, 1847, the auditor for this department was instructed to examine the claims of A. M. Cumming; and I find that this was done accordingly, and a decision made on the 30th September, 1848, adverse to the claimant.

The whole case was thus placed beyond the control of this department, and I have to suggest that whatever information you may desire concerning it must be applied for through the Secretary of the Treasury.

Very respectfully, your obedient servant,

E. S. CHILDS,
For the Second Assistant Postmaster General.

DANIEL RATCLIFF, Esq.,
Assistant Solicitor Court of Claims, Washington City.

COURT OF CLAIMS.—No. 1.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

JUNE 24, 1856.

SIR: Please to take notice that the depositions of John V. D. Joline and Joseph Cunningham will be taken upon interrogatories (copies of which are herewith served upon you) before the clerk of the county of Mercer, at his office in Trenton, in said county, on the 22d day of July, 1856, at ten o'clock in the forenoon.

Yours, &c.,

ALEX. M. CUMMING,
Complainant.

M. BLAIR, Esq., *United States Solicitor,*
Washington, D. C.

Interrogatories to be administered to Joseph Cunningham, of Trenton, New Jersey, a witness produced by complainant.

1st question. What is your name, age, and occupation, and where do you reside?

2d. Are you acquainted with complainant, and if so, how long and where have you known him?

3d. Were you in 1836, or at any other and what time, acquainted with mail routes Nos. 951 and 952, from Philadelphia to New York?

4th. By what contractor and in what manner were the United States mails transported on those routes from January, 1836, to July, 1840, inclusive?

5th. How many teams of horses, coaches, and wagons were employed in the transportation of the mail on those routes, respectively, during the time aforesaid?

6th. What was the cost and value of the teams, coaches, and harnesses employed on those routes by complainant, if any were employed by him?

7th. Was the mail carried over said lines or routes, or either of them, by night or day, or both, and were there any other night or Sunday lines than those run by complainant on the routes above mentioned?

8th. After such teams, horses, harnesses, carriages, and wagons had been purchased and put on said routes, under an expectation of having them employed thereon for four years, would the contractor suffer any and what loss upon said property by having an end put to his contract?

9th. What was the average number of passengers which passed daily over those routes and each way; and what was the price and value of transporting said passengers?

10th. What was the value of the daily, weekly, and monthly income of these routes, respectively, to the contractor for the transportation of the mails and passengers?

11th. What was the daily, weekly, and monthly expense to the contractor for the transportation of the mails and passengers on said routes?

12th. What was the daily, weekly, and monthly profits of the contractor for carrying the mails on the routes above mentioned during the years 1836 and 1837, upon the supposition that the contract price for carrying said mails was \$9,990 *per annum* on route No. 952 and \$13,125 on route No. 951?

13th. Was the stage property thrown out of employ in the winter of 1836-'37 less valuable than at any other season of the year, and if so, state the reasons why it was less valuable?

14th. How long was the contractor engaged in organizing and perfecting his lines of stages on the routes aforesaid before they were broken up?

15th. Were the arrangements of the contractors on these routes equal to the service required for four years from January 1, 1836.

16th. Do you know or have you heard any other matter or thing relative to the claims of the complainant against the United States for damages in consequence of the annulling of his contracts by the Postmaster General, for carrying the United States mail on routes No. 951 and 952, or for extra services performed or expenses incurred by him on these routes, or either of them, which will tend to the benefit or advantage of the complainant, and if so, state the same, as if particularly interrogated thereto?

J. D. WOODWARD,
Attorney for complainant.

COURT OF CLAIMS.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

Interrogatories to be administered to John Van Dyke Joline, of Princeton, New Jersey, a witness produced by claimant.

1st question. What is your name, age, and occupation, and where do you reside?

2d. Are you acquainted with complainant, and if so, how long and where have you known him?

3d. Were you in 1836, or at any other time and what time, acquainted with mail routes No. 951 and 952, from Philadelphia to New York?

4th. By what contractor and in what manner were the United States mails transported on those routes from January, 1836, to July, 1840, inclusive?

5th. How many teams of horses, coaches, and wagons were employed in the transportation of the mail on these routes, respectively, during the time aforesaid?

6th. What was the cost and value of the teams, coaches, and harnesses employed on these routes by complainant, if any were employed by him?

7th. Was the mail carried over said lines or routes, or either of them, by night or day, or both, and were there any other night or Sunday lines than those run by complainant on the routes above mentioned?

8th. After such teams, horses, harnesses, carriages, and wagons had been purchased and put on said routes, under an expectation of having them employed thereon for four years, would the contractor suffer any and what loss upon said property by having an end put to said contract?

9th. What was the average number of passengers which passed daily over these routes each way, and what was the price and value of transporting said passengers?

10th. What was the value of the daily, weekly, and monthly income of those routes, respectively, to the contractor for the transportation of the mail and passengers?

11th. What was the daily, weekly, and monthly expense to the contractor for the transportation of the mails and passengers on said routes?

12th. What was the daily, weekly, and monthly profits of the contractor for carrying the mails on the routes above mentioned, during the years 1836 and 1837, upon the supposition that the contract price for carrying said mails was \$13,125 on route No. 951 and \$9,990 on route No. 952 per annum.

13th. Was stage property thrown out of employ in the winter of 1836-'37 less valuable than at any other season of the year, and if so, state the reasons why it was less valuable?

14th. How long was the contractor engaged in organizing and perfecting his lines of stages on the routes aforesaid before they were broken up.

15th. Were the arrangements of the contractor on those routes equal to the service required for four years from January 1, 1836?

16th. Do you know or have you heard any other matter or thing relative to the complainant's claims against the United States for damages in consequence of the annulling of his contract by the Postmaster General, for carrying the United States mails on routes No. 951 and No. 952, or for extra services performed or expenses incurred by him on those routes, or either of them, which will tend to the benefit or advantage of the complainant, and if so, state the same, as if particularly interrogated thereto?

J. D. WOODWARD,
Attorney for complainant.

Endorsement by the United States Solicitor in the Court of Claims:
"I have no interrogatories.

"M. BLAIR, *United States Solicitor.*"

OFFICE OF CHIEF CLERK OF COURT OF CLAIMS,
Washington, August 7, 1856.

I hereby certify that the foregoing are true copies of the original notice and interrogatories filed in this office in the case of Alex. M. Cumming *vs.* The United States; and that the same were duly served on the Solicitor of the United States within the proper time required by the rules of the Court, and that the copy of the Solicitor's entry thereon is also true.

In testimony whereof I have hereunto set my hand and affixed the
[SEAL.] seal of the said Court, at Washington, on the day and year
last above written.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

STATE OF NEW JERSEY, ss.

I, William R. Murphy, clerk of the circuit court of the county of Mercer, in said State, and commissioner of the United States under the act of Congress entitled "An act to establish a court for the investigation of claims against the United States," do solemnly promise and swear that I will faithfully perform the duties of such commission, according to the best of my abilities and understanding, so help me God.

WM. R. MURPHY.

Sworn and subscribed before me, at Trenton, this 21st day of July,
A. D. 1856.

WM. C. HOWARD,
Justice of the Peace.

Deposition of John Van Dyke Joline to the interrogatories hereto
annexed.

Question 1. What is your name, age, and occupation, and where do you reside?

Answer. John Van Dyke Joline; forty-nine years; farmer; and reside near Princeton, New Jersey.

Question 2. Are you acquainted with complainant, and if so, how long and where have you known him?

Answer. I am acquainted with complainant; have known him for thirty-three years, at Newark, New Jersey, and at Princeton.

Question 3. Were you, in 1836, or at any other and what time, acquainted with mail routes No. 951 and 952, from Philadelphia to New York?

Answer. I was in 1836, 1837 and 1838, acquainted with mail routes No. 951 and 952.

Question 4. By what contractor and in what manner were the United States mails transported on those routes from January, 1836, to July, 1840, inclusive?

Answer. The contractor on those routes was Alexander M. Cumming; in four-horse coaches from Philadelphia to New Brunswick, New Jersey, and from thence to New York by railroad, until the route 951 was put upon the railroad in January, 1837; I mean the Camden railroad.

Question 5. How many teams of horses, coaches, and wagons were employed in the transportation of the mail on those routes respectively, during the time aforesaid?

Answer. Eight four-horse teams and four coaches on each route, making sixteen teams and eight coaches; by extra wagons.

Question 6. What was the cost and value of the teams, coaches, and harness employed on those routes by complainant, if any were employed by him?

Answer. The value of the aforesaid horses, harness, and coaches was twelve thousand seven hundred dollars.

Question 7. Was the mail carried over said lines or routes or either of them by night or day, or both, or were there any other night or Sunday lines than those run by complainant on the routes above mentioned?

Answer. Over one route the mail was run by day and over the other by night; there were no other lines run either by night or on Sunday.

Question 8. After such teams, horses, harness, carriages, and wagons had been purchased and put on said routes under an expectation of having them employed thereon for four years, would the contractor suffer any and what loss upon said property by having an end put to this contract?

Answer. He would suffer a loss of about three thousand dollars for each route; that is, the property would be depreciated to that amount.

Question 9. What was the average number of passengers which passed daily over those routes each way, and what was the price and value of transporting said passengers?

Answer. The average number of passengers on each route each way daily was six, making twenty-four daily, at the price and value of four dollars each.

Question 10. What was the value of the daily, weekly, and monthly income of those routes, respectively, to the contractor, for the transportation of the mails and passengers?

Answer. The value to the contractor for transporting the mails and passengers daily was sixty dollars on each route, four hundred and twenty dollars weekly, and eighteen hundred dollars monthly; that is, for each route.

Question 11. What was the daily, weekly, and monthly expense to the contractor for the transportation of the mails and passengers on said routes?

Answer. The daily, weekly, and monthly expense for transporting

the mails and passengers on said routes was about thirty dollars daily, two hundred and ten dollars weekly, and nine hundred dollars monthly on each route.

Question 12. What was the daily, weekly, and monthly profits of the contractor for carrying the mails on the routes above mentioned during the years 1836 and 1837, upon the supposition that the contract paid for carrying said mails was \$9,990 per annum on route No. 952, and \$13,125 on route No. 951?

Answer. The profits to the contractor for carrying the mails over both routes would be about sixty-eight dollars daily, four hundred and seventy-seven dollars weekly, and two thousand and fifty-nine dollars monthly.

Question 13. Was the stage property thrown out of employ in the winter of 1836-7 less valuable than at any other season of the year? and if so, state the reasons why it was less valuable.

Answer. It was less valuable because grain and fodder are much higher, and no employment and duller sale for such property than other seasons of the year.

Question 14. How long was the contractor engaged in organizing and perfecting his lines of stages on the routes aforesaid before they were broken up?

Answer. One year.

Question 15. Were the arrangements of the contractor on those routes equal to the service required for four years from January 1, 1836?

Answer. They were.

Question 16. Do you know or have you heard any other matter or thing relative to the claims of the complainant against the United States for damages in consequence of the annulling of his contract by the Postmaster General for carrying the United States mails on routes Nos. 951 and 952, or for extra services performed or expenses incurred by him on those routes, or either of them, which will tend to the benefit or advantage of the complainant? and if so, state the same as if particularly interrogated thereto.

Answer. I know that the complainant carried the mails for some four or five weeks after I understood that the Postmaster General had annulled his contract; I know also that, on account of an unusually severe storm of snow in the winter of 1836, a very large amount of mail matter accumulated, which in ordinary times could have been carried by the regular stages; the complainant was obliged to hire horses and sleighs in addition to his own for the transportation of such mail matter. This accumulation occurred at New York and at Philadelphia in consequence of the non-arrival at those points of the mails north and south, and I have heard that the complainant was directed to incur this extra expense by the postmaster at Philadelphia and George Plitt, a special agent of the Post Office Department. I have no interest, direct or indirect, in the claim which is the subject of inquiry, and I am in no degree related to the complainant.

J. V. D. JOLINE.

STATE OF NEW JERSEY, *Mercer County*, ss.

On this 21st day of August, A. D. 1856, personally came John Van Dyke Joline, the witness within named, and after having been first sworn to tell the truth, the whole truth and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of John Van Dyke Joline, taken at the request of Alexander M. Cumming, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Alexander M. Cumming.

The adverse party was notified, did not attend, and did not object.

WM. R. MURPHY,
Commissioner.

Deposition of Joseph Cunningham to interrogatories hereto annexed:

1st question. What is your name, age and occupation, and where do you reside?

Answer. My name is Joseph Cunningham; I am fifty-six years old; I am a hotel-keeper; I reside in the city of Trenton.

2d question. Are you acquainted with complainant, and if so, how long and where have you known him?

Answer. I am acquainted with complainant, and have known him twenty years at Princeton and Trenton.

3d question. Were you in 1836, or at any other and what time acquainted with mail routes Nos. 951 and 952 from Philadelphia to New York?

Answer. I was acquainted in 1836 with mail routes Nos. 951 and 952 from Philadelphia to New York.

4th question. By what contractor and in what manner were the United States mails transported on those routes from January, 1836, to July, 1840, inclusive?

Answer. The contractor was Alexander M. Cumming, and the mails were transported in four horse coaches from Philadelphia to New Brunswick, and from thence to New York by railroad.

5th question. How many teams of horses, coaches and wagons were employed in the transportation of the mail on those routes, respectively, during the time aforesaid?

Answer. Eight teams, two coaches and two wagons to each line, making sixteen teams, four coaches and four wagons for the two routes, besides extra wagons on both routes in case of accident.

6th question. What was the cost and value of the teams, coaches and harness employed on those routes by complainant, if any were employed by him?

Answer. The cost and value of the teams, coaches and harness employed by complainant was from twelve to thirteen thousand dollars.

7th question. Was the mail carried over said lines or routes, or either of them by night or day, or both, and were there any other night or Sunday lines than those run by complainant on the routes above mentioned?

Answer. The mails were carried over the routes both by day and night, and there were no other lines either by night or Sunday than those run by complainant.

8th question. After such teams, horses, harness, carriages and wagons had been purchased and put on said routes under an expectation of having them employed thereon for four years, would the contractor suffer any, and what loss on said property by having an end put to his contract?

Answer. I should say he would lose three thousand dollars for each line.

9th question. What was the average number of passengers which passed daily over those routes, and each? and what was the price and value of transporting said passengers?

Answer. The average number of passengers on each line each way daily was six, and the price of each was four dollars.

10th question. What was the value of the daily, weekly, and monthly income of those routes, respectively, to the contractor for the transportation of the mails and passengers?

Answer. The value to the contractor for transporting the mails and passengers on each route, sixty-dollars daily, four hundred and twenty dollars weekly, and eighteen hundred dollars monthly.

11th question. What was the daily, weekly, and monthly expense to the contractor for the transportation of the mails and passengers on said routes?

Answer. The daily, weekly, and monthly expense to the contractor for transporting the mails and passengers on each of said routes was about thirty dollars daily, two hundred and ten dollars weekly, and nine hundred dollars monthly.

12th question. What were the daily, weekly, and monthly profits to the contractor for carrying the mails on the routes above mentioned during the years 1836 and 1837, upon the supposition that the contract paid for carrying said mails was \$9,990 per annum on route No. 952, and \$13,125 on route No. 951?

Answer. The profits to the contractor for carrying the mails over both routes would be about sixty-eight dollars daily, four hundred and seventy-seven dollars weekly, and two thousand and fifty-nine dollars monthly.

13th question. Was the stage property thrown out of employ in the winter of 1836-'37 less valuable than at any other season of the year, and, if so, state the reasons why it was less valuable?

Answer. It was less valuable on account of the increased cost of grain and hay, and the want of employment, and the dullness of sale for such property in the winter.

14th question. How long was the contractor engaged in organizing

and perfecting his lines of stages on the routes aforesaid before they were broken up?

Answer. Not less than one year.

15th question. Were the arrangements of the contractor on those routes equal to the service required for four years from January 1, 1836?

Answer. They were entirely so.

16th question. Do you know, or have you heard, any other matter or thing relative to the complainant's claims against the United States for damages in consequence of the annulling of his contract by the Postmaster General for carrying the United States mails on routes No. 951 and No. 952, or for extra services performed or expenses incurred by him on those routes, or either of them, which will tend to the benefit or advantage of the complainant, and, if so, state the same as if particularly interrogated thereto?

Answer. At that time I was postmaster at Trenton. I recollect, from conversations with the complainant and from his correspondence with the Post Office Department, that his pay for route No. 951 was stopped three weeks before the schedule for the new service was received, which was three weeks before January 1, 1837, and he continued the service up to that time. I know also that he was at great additional expense for transporting the mails during a very violent snow storm in the winter of 1836, which expense he was advised to incur by Mr. Plitt, an agent of the department, who assured the contractor in my presence that such extra expenses would be paid by the department. I also advised the contractor to the same course, because the mail matter had so accumulated as to render it necessary. I have no interest, direct or indirect in the claim which is the subject of inquiry, and am in no degree related to the complainant.

JOSEPH CUNNINGHAM.

STATE OF NEW JERSEY, }
Mercer County, } ss.

On this twenty-first day of August, A. D. 1856, personally came Joseph Cunningham, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who subscribed the deposition in the presence of the commissioner. The deposition of Joseph Cunningham, taken at the request of Alexander M. Cumming, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Alexander M. Cumming. The adverse party was notified, did not attend, and not object.

WM. R. MURPHY, *Commissioner.*

No. 2.

STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss.

On this 30th day of September, A. D. 1856, personally came George Plitt, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by the commissioner, in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of George Ritt, taken at the request of A. M. Cumming, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Alexander M. Cumming.

The adverse party was notified and did not attend.

JAMES R. LUDLOW, *Commissioner*.

Fees of witness, \$1 50; commissioner's fees, \$10; postage, 9 cents.

GEORGE PLITT, being duly sworn according to law to tell the truth, the whole truth, and nothing but the truth, relative to the cause of Alexander M. Cumming *vs.* The United States, deposes and says as follows :

1st. What is your name, age, and occupation, and where do you reside ?

Answer. My name is George Plitt, aged fifty-four. I am clerk of the circuit court of the United States for the eastern district of Pennsylvania, and I reside in the city of Philadelphia.

2d. Are you acquainted with complainant, and, if so, how long and where have you known him ?

Answer. I am acquainted with complainant. I have known him from 1833 or 1834 to the present time ; first knew him in Baltimore as agent for Stockton & Stokes, mail contractors ; and afterwards in Princeton, his present residence, as mail contractor between Philadelphia and New York.

3d. Were you in 1836 or any other time, and at what time, agent for the General Post Office Department for forwarding the United States mails between the cities of New York and Philadelphia ?

Answer. I was then the general agent of the Post Office Department, having the general superintendence of post offices and mails throughout the Union.

4th. Were you in 1836 or at any other time, and at what time, acquainted with mail routes Nos. 951 and 952 from Philadelphia to New York ?

Answer. Yes, sir.

5th. By what contractor and in what manner were the mails transported over these routes from January, 1836, to July, 1840, inclusive?

Answer. I think that Mr. Cumming was the contractor for these two routes during that time; he certainly carried the mail in the winter of 1835 and 1836. The books of the department will tell who the contractor was.

6th. Was the winter of 1835 and 1836 mild, or extraordinary for its severity?

Answer. It was a very severe winter, indeed.

7th. Was there in January, 1836, an unusual snow storm; and if so, what was the effect of said storm upon the roads and transportation of the mails?

Answer. It was a very heavy snow storm indeed, and so severe that it was impossible to transport the mails in the railroad cars, and that, in consequence, the contractor was obliged to buy stock and sleds and coaches, and whatever was necessary to transport the mails with rapidity, and that I, as the agent of the department, encouraged him to do this, and assuring him that the department would liberally remunerate him for his extraordinary exertions and the necessary increased expenses.

8th. In consequence of the state of the roads at the time, were the United States mails delayed in the time of their arrival at New York and Philadelphia; and if so, how long were they delayed?

Answer. They were considerably delayed, two and three days' mails, back mails, arriving at the same time; all of which were, of course, carried over the route to and from New York by Colonel Cumming, the contractor, to the exclusion of all passengers.

9th. Was there, in consequence of an unprecedented storm of snow, an unusually large collection or accumulation of mails at Philadelphia and New York, or at either of those places, in January, 1836, or at any other or what time?

Answer. There was an unusually large accumulation of the mails at both points in January, 1836.

10th. Did you as agent of the Postmaster General, give any and what directions to A. M. Cumming to have the aforesaid mails forwarded by extra trains or carriages; and if so, what were these directions, and to whom and where were they given?

Answer. They were given both verbally and by letter from the Philadelphia post office to Colonel Cumming. In a letter addressed to Colonel Cumming on the 25th of December, 1841, while I was yet the agent of the Post Office Department, and when the whole of the circumstances were still fresh upon my recollection—a copy of which letter was annexed to the interrogatories in the hands of the commissioner, and which is marked J.R.L. No. 1—will be found a full and true statement as I then believed and do still believe, of the whole facts of the case, and which letter I desire to make a part of my testimony.

11th. Were any and what promises of remuneration made by you to the contractor for the extra services in sending forward said mails;

and were his teams sufficient and ample for the transportation of his regular mails on the routes above mentioned?

Answer. I have answered the first part of the question in my answer to the 10th interrogatory; his teams were sufficient and ample for the transportation of the regular mails on the routes above mentioned; that is my impression.

12th. Did you frequently pass over the routes above mentioned when the sleighs of A. M. Cumming were loaded solely with mails?

Answer. I did.

13th. Was there a misunderstanding between Mr. Kendall, Postmaster General and the Jersey Railroad Company, and did such company refuse to carry the mails thus accumulated on their railroad at any price?

Answer. I think there was such a misunderstanding at the time, and that the company, according to my impression, refused to carry the mails.

14th. Did you as agent of the Post Office Department direct the said A. M. Cumming to spare no expense to get the mails through, and state to him that the department would certainly compensate him for his extraordinary expenses and services?

Answer. I did.

15th. Was the Postmaster General made acquainted with your course in forwarding said mails, and did he approve or disapprove of your conduct and directions in relation thereto?

Answer. He was made acquainted at the time with all I did in the matter, and my strong impression is that my whole course met with his warm and cordial approval.

16th. Was the extra service performed with fidelity by Colonel A. M. Cumming, and if so, at what expense?

Answer. The extra service was performed with fidelity by Colonel Cumming, but I have no means of knowing at what expense.

17th. What was the value of the extra expenses incurred by A. M. Cumming, in sending forward the large accumulation of mails to which reference has already been made?

Answer. I have no means of knowing; I know he added largely to his stock at the time, and that he must have added greatly to his expenses.

18th. Did you on December 25, 1841, address a letter in regard to said extra services to Colonel A. M. Cumming, and if so is the paper herewith presented to you a copy of such letter?

Answer. I did, and the letter hereunto annexed and before referred to by me, I believe to be a true copy.

19th. When did the new arrangement so called, for carrying the mails on routes 951 and 952 commence?

Answer. I do not now remember when the arrangement commenced, but the books of the department will show.

20th. Were said mails carried by Colonel Cumming until January 1, 1837, on the routes above mentioned, and was the service performed with the approbation of yourself and the postmaster at Philadelphia?

Answer. Yes; my impression is that they were, and with the ap-

probation of Colonel Page, the postmaster at Philadelphia, and myself.

21st. Did Colonel Cumming transport the United States mails on the routes above mentioned for above period?

Answer. I believe he did, as he was the contractor.

22d. What was the contract price for the transportation of said mails on said routes from December 3, to December 31, 1836; and was such a reasonable compensation for said service?

Answer. I cannot answer this question; the books of the department will show that.

23d. Do you know any other matter or thing touching the matters in question that may tend to the benefit or advantage of the complainant; if yea, declare fully, and at large, as if you had been particularly interrogated thereto?

Answer. I know of nothing but that which I have already stated, except that Colonel Cumming should have been paid long ago.

GEORGE PLITT.

Sworn and subscribed before me this thirteenth day of September, A. D. 1856.

JAMES R. LUDLOW,
Commissioner.

COURT OF CLAIMS.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

JUNE 24, 1856.

SIR: Please to take notice that the deposition of George Plitt will be taken upon interrogatories (a copy of which is herewith served upon you) before and by James R. Ludlow, esq., United States commissioner, at his office in Philadelphia, No. 30 South Fifth street, on the 23d day of July, 1856, at ten o'clock in the forenoon.

Yours, &c.,

ALEXANDER M. CUMMING,
Complainant.

M. BLAIR, Esq., *U. S. Commissioner, Washington, D. C.*

J. R. L. No. 1.

NEW YORK, *December 25, 1841.*

MY DEAR SIR: Your letter of yesterday's date, calling my attention to the extra service performed by you as mail contractor on the route from Philadelphia to New York during the extraordinary winter of 1835-'36, has this moment been received. I can only state to you what I have heretofore stated to the department at the time, and repeatedly since, that you had a just claim for important and extra services rendered to the department during the unparalleled snow storm of January, 1836; and I had supposed that it had long since been

allowed to you. I remember well that in consequence of the state of the roads at the time no mails arrived at either Philadelphia or New York from the south or east for two or three days at a time, and then double and triple mails would come together. To get these on without delay I directed you to hire extra conveyances and teams to run between the two cities while the difficulty lasted, and that you would be remunerated by the department for this extra service. I know, too, that I frequently passed over the road upon your sleighs which were loaded solely with the mails, and in repeated letters to Mr. Kendall, the Postmaster General, I recommended your zeal, activity, and extraordinary exertions to have the entire mails carried through. Mr. Kendall was highly gratified with the proof you gave of your desire to serve the department, and the more so because the Jersey Railroad Company had had a misunderstanding or difficulty with him and they refused positively to carry the mails thus enumerated upon any terms. Both Colonel Page and myself called upon the company urging them for the sake of the great good they would confer upon the people of Philadelphia and New York to at least carry a part of the mails, but without success. It was in this dilemma that I wrote to you to spare no expense in order to get the whole mail through, and that the department would certainly compensate you. Mr. Kendall approved of my course in the premises. That you performed the extra service with fidelity and at great expense to yourself is well known to Colonel Page, then postmaster of Philadelphia, and myself. And the newspapers of the day in both cities had frequent commendatory notices of your exertions, as well as of the officers of the department.

You are at liberty to use this letter if you think it will assist you in obtaining your claim.

I am, respectfully, your obedient servant,

GEORGE PLITT,
Agent Post Office Department.

A. M. CUMMING, Esq.,
Princeton, New Jersey.

COURT OF CLAIMS.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

Interrogatories to be administered to George Plitt, esq., of Philadelphia, Pennsylvania, as witness produced by complainant:

1st. What is your name, age, and occupation, and where do you reside?

2d. Are you acquainted with complainant; and if so, how long and where have you known him?

3d. Were you in 1836, or any other time, and what time, agent of the General Post Office Department for forwarding the United States mails between the cities of New York and Philadelphia?

4th. Were you in 1836, or at any other time, and what time, acquainted with mail routes Nos. 951 and 952 from Philadelphia to New York?

5th. By what contractor and in what manner were the mails transported over those routes from January, 1836, to July, 1840, inclusive?

6th. Was the winter of 1835 and '36 mild, or extraordinary for its severity?

7th. Was there in January, 1836, an unusual snow storm, and if so, what was the effect of said storm upon the roads and transportation of the mails?

8th. In consequence of the state of the roads at the time, were the United States mails delayed in the time of their arrival at New York and Philadelphia, and if so, how long were they delayed?

9th. Were there, in consequence of an unprecedented storm of snow, an unusually large collection or accumulation of mails at Philadelphia and New York, or at either of those places in January, 1836, or at any other or what time?

10th. Did you as agent of the Postmaster General, give any and what directions to Colonel Cumming to have the aforesaid mails forwarded by extra trains or carriages, and if so, what were these directions, and to whom and when were they given?

11th. Were any and what promises of remuneration made by you to the contractor for the extra services in sending forward said mails, and were his trains sufficient and ample for the transportation of his regular mails on the routes above mentioned?

12th. Did you frequently pass over the routes above mentioned when the sleighs of Colonel Cumming were loaded solely with mails?

13th. Was there a misunderstanding between Mr. Kendall, Postmaster General, and the Jersey Railroad Company, and did such company refuse to carry the mails thus accumulated on their railroad at any price?

14th. Did you as agent of the Post Office Department, direct the said A. M. Cumming to spare no expense to get the mails through, and state to him that the department would certainly compensate him for his extraordinary expense and services?

15th. Was the Postmaster General made acquainted with your course in forwarding said mails, and did he approve or disapprove of your conduct and directions in relation thereto?

16th. Was the extra service performed with fidelity by Colonel A. M. Cumming, and if so, at what expense?

17th. What was the value of the extra expenses incurred by A. M. Cumming in sending forward the large accumulation of mails to which reference has already been made?

18th. Did you on December 25, 1841, address a letter in regard to said extra services to Colonel A. M. Cumming, and if so, is the paper herewith presented to you a copy of such letter?

19th. When did the new arrangement, so called, for carrying the mails on routes 951 and 952 commence?

20th. Were said mails carried by Colonel Cumming until January 1, 1837, on the routes above mentioned, and was the service per-

formed with the approbation of yourself and the postmaster at Philadelphia?

21st. Did Colonel Cumming transport the United States mails on the routes above mentioned for above period?

22d. What was the contract price for the transportation of said mails on said routes from December 3, to December 31, 1836, and was such a reasonable compensation for said service?

23d. Do you know any other matter or thing touching the matters in question that may tend to the benefit or advantage of the complainant; if yea, declare fully and at large as if you had been particularly interrogated thereto?

J. D. WOODWARD,
Attorney for plaintiff.

[Endorsement by the United States Solicitor.]

"I have no interrogatories.

"M. BLAIR, *Solicitor United States.*"

OFFICE OF CHIEF CLERK COURT OF CLAIMS,
Washington, August 7, 1856.

I hereby certify that the foregoing are true copies of the original notice, interrogatories, and exhibit thereto prefixed, filed in this office in the case of Alexander M. Cumming *vs.* The United States; and that the same were duly served on the Solicitor of the United States, within the proper time required by the rules of the Court, and that the copy of the Solicitor's endorsement thereon is also true.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said Court at Washington, on the day and year last above written.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

No. 3.

COURT OF CLAIMS.

ALEXANDER CUMMING *vs.* THE UNITED STATES.

JUNE 24, 1856.

SIR: Please to take notice that the deposition of Peter R. Stelle will be taken upon interrogatories (a copy of which is herewith served upon you) before Aaron Ogden, esq., as commissioner, at his office in the city of New York. No. 52 Trinity Buildings, Broadway, on the 25th day of July, 1856, at 10 o'clock in the forenoon.

Yours, &c.,

ALEX. M. CUMMING,
Complainant.

M. BLAIR,
United States Solicitor, Washington, D. C.

COURT OF CLAIMS.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

Interrogatories to be administered to Peter R. Stelle, of the city of New York, a witness produced by complainant :

1st question. What is your name, age, and occupation, and where do you reside?

2d. Are you acquainted with complainant, and if so, how long and where have you known him?

3d. Were you in 1836, and at any other time, and what time, acquainted with mail routes No. 951 and 952, from Philadelphia to New York?

4th. By what contractor and in what manner were the United States mails transported on those routes from January, 1836, to July, 1840, inclusive?

5th. How many teams of horses, coaches, and wagons were employed in the transportation of the mail on the routes, respectively, during the term aforesaid?

6th. What was the cost and value of the teams, coaches, and harnesses employed on those routes by complainant, if any were employed by him?

7th. Was the mail carried on said lines or routes, or either of them, by night or day, or both, and were there any other night or Sunday lines than those run by complainant on the route above mentioned?

8th. After such teams, horses, harness, carriages, wagons, &c., has been purchased and put on said routes under an expectation of having them employed thereon for four years, would the contractor suffer any and what loss upon said property by having an end put to his contract?

9th. What was the average number of passengers which passed daily over these routes each way, and what was the price and value of transporting said passengers?

10th. What was the value of the daily, weekly, and monthly income of these routes, respectively, to the contractor for the transportation of the mail and passengers?

11th. What was the daily, weekly, and monthly expense to the contractor for the transportation of the mails and passengers on such routes?

12th. What was the daily, weekly, and monthly profits of the contractor for carrying the mails on the routes above mentioned during the years 1836 and 1837, upon the supposition that the contract price for carrying said mails was \$13,125 on route No. 951, and \$9,990 on route No. 952, per annum?

13th. Was stage property thrown out of employ in the winter of 1836-'37 less valuable than any other season of the year, and if so, state the reasons why it was less valuable?

14th. How long was the contractor engaged in organizing and per-

fecting his lines of stages on the routes aforesaid before they were broken up?

15th. Were the arrangements of the contractor on those routes equal to the service required for four years from January 1, 1836?

16th. Do you know or have you heard any other matter or thing relative to the claims of the complainant against the United States for damages in consequence of the annulling of his contract by the Postmaster General for carrying the United States mails on route No. 951 and 952, or for extra services performed or expenses incurred by him on those routes, or either of them, which will tend to the benefit or advantage of the complainant, and if so, state the same as if particularly interrogated thereto?

J. D. WOODWARD,
Attorney for complainant.

[Endorsement by Hon. M. Blair, Solicitor United States in the Court of Claims.]

"I have no interrogatories.

"M. BLAIR, *Solicitor.*"

OFFICE OF CHIEF CLERK COURT OF CLAIMS,
Washington, August 7, 1856.

I hereby certify that the foregoing are true copies of the original notice and interrogatories filed in my office in the above mentioned case, and that the same were duly served on the solicitor of the United States within the proper time required by the rules of the Court, and that the copy of the solicitor's entry thereon is also true.

In testimony whereof, I have hereunto set my hand and affixed the [L. s.] seal of said Court at Washington, on the day and year last above written.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

On this twenty-eighth day of August, in the year of our Lord one thousand eight hundred and fifty-six, at my office, number one hundred and eleven Broadway, in the city of New York, before me, Aaron Ogden, a commissioner for the State of New York, appointed to take testimony to be used in the said Court of Claims, personally appeared Peter R. Stelle, the witness named in the annexed commission, and the said Peter R. Stelle, after having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, doth depose and testify as follows:

First question. What is your name, age, and occupation, and where do you reside?

To the first question he says: My name is Peter R. Stelle. I am forty-nine years of age. I am a hotel-keeper. I reside in the city of New York. I have resided in the city of New York the last twelve years. I have no interest, direct or indirect, in the claim which is the subject of inquiry. I am in no way related to Alexander M. Cumming, the claimant.

Second question. Are you acquainted with the complainant, and if so, how long and where have you known him?

To the second question he says: I have been acquainted with Mr. Cumming more than twenty years. I have been acquainted with Mr. Cumming twenty-two years. I knew him in New Jersey.

Third question. Were you in 1836 and at any other time and what time, acquainted with mail routes No. 951 and 952, from Philadelphia to New York?

To the third question he says: I was acquainted with those routes from 1836 to 1839. I was Mr. Cumming's agent during that time.

Fourth question. By what contractor and in what manner were the United States mails transported on those routes from January, 1836, to July, 1840, inclusive?

To the fourth question he says: They were transported by Alexander M. Cumming, as contractor, in four-horse coaches and four-horse wagons during that time, from Philadelphia to New Brunswick, and in cars from New Brunswick to New York.

Fifth question. How many teams of horses, coaches, and wagons were employed in the transportation of the mail on the routes respectively during the term aforesaid?

To the fifth question he says: On line No. 951, eight teams, two coaches, and two wagons; on line No. 952, eight teams, two coaches, and two wagons. In addition to the above, there were always kept four additional extra teams for the two lines, and four extra coaches or wagons.

Sixth question. What was the cost and value of the teams, coaches, and harnesses employed on these routes by complainant, if any were employed by him?

To the sixth question he says: The cost and value of the whole stock of teams, coaches, and harnesses employed by complainant on these routes was between twelve and thirteen thousand dollars.

Seventh question. Was the mail carried on said lines or routes, or either of them, by night or day or both; and were there any other night or Sunday lines than those run by complainant on the routes above mentioned?

To the seventh question he says: There was one day line and one night line. There was no other Sunday or night line than those run by complainant on the routes.

Eighth question. After such teams, horses, harnesses, carriages, wagons, &c., had been purchased and put on said routes under an expectation of having them employed thereon for four years, would the contractor suffer any and what loss upon said property, by having an end put to his contract?

To the eighth question he says: I should think, in such a case, the

contractor would suffer a loss of about four thousand dollars on each of the two lines.

Ninth question. What was the average number of passengers which passed daily over these routes each day, and what was the price and value of transporting said passengers?

To the ninth question he says: I should think the average number which passed each way daily over each line was six. The price of transporting passengers from New York to Philadelphia was four dollars.

Tenth question. What was the value of the daily, weekly, and monthly income of these routes respectively to the contractor, for the transportation of the mail and passengers?

To the tenth question he says: The daily income was about one hundred and twenty dollars; the monthly income, about three thousand six hundred. The weekly income was about eight hundred and forty dollars.

Eleventh question. What was the daily, weekly, and monthly expense to the contractor for the transportation of mails and passengers on such routes?

To the eleventh question he says: I should think the daily expense on each line was thirty-five dollars; the weekly expense two hundred and forty-five dollars; the monthly expense one thousand and fifty dollars for each line.

Twelfth question. What was the daily, weekly, and monthly profits of the contractor for carrying the mails on the routes above mentioned, during the years 1836 and 1837, upon the supposition that the contract price for carrying said mails was \$13,125 on route No. 951, and \$9,990 on route No. 952, per annum?

To the twelfth question he says: Upon such a supposition the daily profits would be sixty-five dollars; the weekly profits four hundred and fifty-five, and the monthly profits nineteen hundred and fifty dollars on Nos. 951 and 952, for mails and passengers; I mean by the above both mail pay and passenger money.

Thirteenth question. Was stage property thrown out of employ in the winter of 1836-'37, less valuable than any other season of the year? If so, state the reasons why it was less valuable?

To the thirteenth question he says: It was less valuable. It was more expensive keeping the horses in winter than any other season of the year, and there was no employment for such property.

Fourteenth question. How long was the contractor engaged in organizing and perfecting his lines of stages on the routes aforesaid, before they were broken up?

To the fourteenth question he says: He was so engaged one year.

Fifteenth question. Were the arrangements of the contractor on those routes equal to the service required for four years, from January 1, 1856?

To the fifteenth question he says: They were fully so.

Sixteenth question. Do you know, or have you heard any other matter or thing relative to the claims of the complainant against the United States for damages, in consequence of the annulling of his

contract by the Postmaster General, for carrying the United States mails on route Nos. 951 and 952, or for extra services performed, or expenses incurred by him on those routes, or either of them, which will tend to the benefit or advantage of the complainant? And if so state the same as if particularly interrogated thereto?

To the sixteenth question he says: I recollect from conversations with Mr. Cumming, and from his correspondence with the department that his pay for carrying the mail on No. 951 was stopped some three weeks before the schedule for the new service was received, while he carried the mail up to the 1st of January, 1837. I know also that he was at great expense in carrying extra mails during and after a violent snow storm in 1836, which he was advised to do by the officers of the department, and which was necessary to get the whole mail through during the prevalence of the storm.

PETER R. STELLE.

The above examination was taken and reduced to writing, and by the witness subscribed and sworn to this twenty-eighth day of August, eighteen hundred and fifty-six, before me,

AARON OGDEN,
Commissioner.

COURT OF CLAIMS.

Commissioner's return.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

STATE OF NEW YORK, *County of New York, ss.*

On this twenty-eighth day of August, A. D. 1856, personally came Peter R. Stelle, the witness within named, and, after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the written deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Peter R. Stelle, taken at the request of Alexander M. Cumming, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Alexander M. Cumming. The adverse party was notified, did not attend, and did not object.

AARON OGDEN,
Commissioner.

No. 4.

COURT OF CLAIMS.

*Particulars of petitioner's claim.*ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

I.

The United States to Alexander M. Cumming, DR.

1836. For carrying the United States mail *on route* No. 951, from New York to Philadelphia in post coaches, from December 7, 1836, to January 1, 1837, 24 days, at the contract price \$2,625 per quarter, by order of the Postmaster General... \$700 09
Interest on the above services rendered under act of June 3, 1784, from January 1, 1837, to time of payment at 6 per cent.

II.

1836. For furnishing extra teams and transporting a large amount of mail matter which had accumulated during a great snow storm on said route, including his extraordinary expenses, by order of the Postmaster General or his agent..... 827 71
For interest on the above from February 1, 1836, to time of payment at 6 per cent.

III.

1837. For the maximum pay for services in transporting Jan. 1, the United States mail on route No. 952, from January 1, 1837, to July 1, 1840, 3½ years, at \$9,990 per annum, deducting therefrom the amount received, \$8,991, balance due being 10 per cent., retained by the Postmaster General..... 3,496 50
Interest on the above from each quarter day after January 1, 1837, as it accrued to the time of payment at 6 per cent.

IV.

- For losses and damages in consequence of the violation by the Postmaster General of a contract awarded to petitioner for carrying the United States mail on route No. 951, from New York to Philadelphia, from January 1, 1837, to July 7, 1838, 18 months and 7 days, as shown by three witnesses. Average of their estimate of net profits, as appears from answers to interrogatory No. 12, \$233 per week, 79 weeks..... 18,407 00

For like damages sustained by contractor from July 7, 1838, to January 1, 1840, when his mail contract ended; 77 weeks, 3 days, at \$233 per week	\$18,040 85
The contract pay after deducting 20 per cent. on route No. 951, was \$10,500 per annum, for three years, \$31,500.	
For depreciation of contractor's property on route No. 951, in consequence of the annulling of his contract by the Postmaster General. See answers of Messrs. Joline, Cunningham, and Stelle, to interrogatory No. 8	3,000 00
Deduct one month's extra pay, which petitioner received December, 1836, \$875.	

COURT OF CLAIMS.

*Brief.*ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

I. From the evidence in the case it appears that the petitioner was a contractor for carrying the United States mails on route No. 951 and 952, between New York and Philadelphia, by virtue of two contracts dated October 27, 1835. His bids were \$13,125 for route No. 951, and \$9,990 for route No. 952, with 20 per cent. off on No. 951 in case No. 952 should be awarded to him, and 10 per cent. from the sum contained in that for No. 952, should he obtain the contract for No. 951. Both contracts were awarded to him. These contracts were to commence on the 1st day of January, 1836, and to continue in force four years from that time. They contain the usual printed clause, authorizing the Postmaster General to terminate them on forwarding six months' notice of his intention so to do. They also contain a written clause to the effect that, "That in case any arrangement shall hereafter be made under the authority of Congress, to carry the mails for the whole or any part of the route on railroads, then this contract shall be annulled." The letter of acceptance of the petitioner's proposals, addressed to him by the Postmaster General, and which forms a part of the contract, is as follows:

POST OFFICE DEPARTMENT, NORTHERN DIVISION,
December 3, 1835.

SIR: The Postmaster General has accepted your proposal for transporting the mail on route No. 951, at \$13,125, with a deduction

of 20 per cent.; and on condition that in case any arrangement shall hereafter be made under the authority of Congress, to carry the mail for the whole or any part of the route on railroad, then your contract to be annulled, or there shall be a pro rata reduction, as the case may be. And he has also accepted your proposal for route No. 952, at \$9,990 per annum, with a deduction of 10 per cent., and under the same conditions as No. 951; to be run by Princeton, Brunswick, Newark, &c. Contracts and bonds will be forwarded for your execution.

S. R. HOBBIE,

First Assistant Postmaster General.

ALEXANDER M. CUMMING,

Newark, New Jersey.

Under these contracts the petitioner transported the mails on the routes designated, and was entitled to the price agreed upon for the service required. On the 6th of December, 1836, a letter was addressed by Mr. Dyer, for the Postmaster General, to the petitioner, informing him that his contract for No. 951 was annulled, an agreement having been made with the Camden and Amboy railroad to transport the great mail between New York and Philadelphia, and an arrangement made with petitioner for an improvement on No. 952, to supply certain offices that depended on No. 951. The pay on that route was stopped December 7, 1836, but the schedule for the new arrangement bears date December 27, 1836, and was not received by petitioner until the 30th of said month, up to which time he continued to transport the mail; and the postmasters of Newark and New Brunswick state that they received two mails a day from Philadelphia until the 1st of January, 1837, and after that one mail a day.

On the 14th of November, 1836, the Assistant Postmaster General, in a postscript to a letter to petitioner, says: "Continue to carry the mails on route No. 951 and No. 952 until otherwise ordered.

S. R. H."

From a letter of Colonel Page, postmaster of Philadelphia, and the register of the arrivals and departures of the mails kept at the post office in Philadelphia, now in the office of the Auditor for the Post Office Department, it appears that the mails were regularly delivered to and carried by the petitioner, on said route, until 31st December, 1836. The letter of C. Dyer was not an order to discontinue the service, nor was it so considered by the contractor or postmasters; and even if the Postmaster General intended to have discontinued the route, such order was not transmitted to the postmasters of New York and Philadelphia, nor were any new schedules furnished to them or the contractor (the only orders by which the contractor and postmasters are governed) until the time mentioned, but the postmasters continued to place the mails in charge of the contractor, and requested him to carry them until the schedule was

received. Had the petitioner discontinued the service on route No. 951 on 7th of December, 1836, (the new schedules on No. 952 not having been made,) the whole line would have been deranged, and the service have suffered. The new schedule, *i. e.* the new order, was received by the postmasters and contractor on the 30th of December, and he stopped on the next day, being the end of the month, quarter, and year. This new schedule changed route No. 951 over to the Camden and Amboy railroad, and also changed the hour of No. 952 from 6 a. m. to 9 p. m., commencing on the 1st of January, 1837. The omission of the Postmaster General to furnish the new schedules justified the contractor in carrying the mail until the end of the year; and the fact that he did perform the service at the request of the postmasters, and under the order of the Assistant Postmaster General, "To continue carrying the mail until otherwise ordered," shows that even if the Postmaster General had the right to, and did put an end to the original contract, his directions above referred to, operated as a new, or enlargement of the old contract, until the schedules were furnished. Besides, a register of the delivery of the mails to the petitioner was daily forwarded to the department, from which it may be inferred that the Postmaster General had knowledge of and gave his assent to the service.

For this service, performed for the United States by the petitioner in good faith, he is fairly entitled to a reasonable compensation, which may be considered the price agreed upon by the parties in the original contract. If the Postmaster General could control or dispense with the service by allowing one month's extra pay, it does not follow that if the service was continued he could employ another person to perform it.

The petitioner is also entitled to interest on the 24 days' service from January 1, 1837, under the act of June 3, 1784, which provides: "That an interest of 6 per cent. per annum shall be paid to all the creditors of the United States for supplies furnished, or services done from the time that payment became due.

II. The petitioner, at the time of the great fall of snow in 1836 which blocked up the roads, and stopped the mails in all the Middle States, performed a large amount of labor, at a heavy expense, in *clearing the snow, and opening the roads, which were impassable*, and furnishing extra teams, and transporting a large amount of mail matter which had accumulated south of Philadelphia and east of New York, which extra labor was performed at the request of Mr. Page, Postmaster at Philadelphia, and by the express direction of George Plitt, special agent of the Post Office Department, under strong assurances that petitioner should be remunerated for his extraordinary services and expenses. In the performance of this extra labor the petitioner expended several hundred dollars, for which proper vouchers were furnished the Post Office Department, but which vouchers were supposed to have been destroyed by the burning of the Post Office building in 1836, in consequence of which, Postmaster General Niles decided that petitioner's claim could not be allowed, for want of suffi-

cient vouchers. The petitioner afterwards procured duplicate vouchers for nearly the whole claim, one or two small items excepted, which in consequence of death or removal of the parties could not be obtained. When these duplicate vouchers were brought to the Post Office Department, in place of those supposed lost by the fire but which were afterwards found, a new Postmaster General was then in office, who objected to opening and examining the case, because he had adopted a rule prohibiting a case once decided from being re-opened without authority of Congress. The action of the officers of the Treasury Department in regard to charges Nos. 1 and 2, does not affect the law of the case, nor the rights of the parties. Devereaux's Reports, pages 80 and 81, No. 296, 298. This extraordinary service, rendered necessary by the act of God, was not provided for in the contract, nor its necessity foreseen. Interest upon the item in question is due to the petitioner, under the act of June 3, 1784 before cited, and upon every principle of justice. These charges were presented to Congress, and allowed by the committee to whom the subject was referred, (see Senate Report No. 28, 2d Session 28th Congress) but the joint resolution, passed in pursuance of said report, proved valueless to the petitioner inasmuch as the accounting officers declined to act or make any allowance under it.

The following is a copy :

Joint Resolution authorizing and directing the examination and settlement of the claims of Alexander M. Cumming. *Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, That the Auditor of the Treasury for the Post Office Department be directed to examine and audit the claims of Alexander M. Cumming of New Jersey, late mail contractor, on routes nine hundred and fifty-one and nine hundred and fifty-two, between the cities of Philadelphia and New York, between the years eighteen hundred and thirty-five, and eighteen hundred and thirty-nine, and it shall be the duty of the Postmaster General to pay him the balance [if any] that may be justly and legally due him under the contracts and orders from the department and its agents out of the current appropriation for mail transportation. January 30, 1846. H. R. 1st Session 29th Cong.

Although this resolution would justify an allowance of petitioner's claims, yet the construction placed upon the contract, acts and orders of the P. M. General by the Auditor in his department has rendered the resolution of no practical value.

III. The claims for the maximum pay for services in transporting the U. S. Mail, on route No. 952, is predicated on the proposals of petitioner, their acceptance, and the contracts which followed. The fair interpretation of the whole is that the deduction of ten per cent was not to be made, unless the petitioner had the benefit and advantages of both routes for the whole period. When the Postmaster General discontinued No. 951, the petitioner's right to maximum pay remained, and he was entitled to the ten per cent under the contract, or by way of damages for the violation of the other by the Postmaster

General. The petitioner states his own and other bids for routes No. 951 and 952 Philadelphia and New York, as follows :

	No. 951.		No. 952.
A. M. Cumming,	\$13,125	A. M. Cumming,	\$9,990
Morris Buckman,	17,000	M. Buckman	7,000
Camden & Amboy R. R.	26,000	C. & A. Railroad,	12,000
Phila. & Trenton R. R.	24,000	Phil. & Trenton R. R.	9,000

That his contract was four years with the privilege of the Department to continue it for 6 months longer, so as to make the year commence in July instead of January, which was done, and he run that mail four and a half years or until July 1840. That the Government saved \$13,500 per annum for three and a half years, or \$47,250 by violating the contract, and effecting his ruin.

IV. The claims for losses and damages sustained by the petitioner in consequence of a violation of the contract for carrying the United States mail from New York to Philadelphia, rests upon a plain and common sense interpretation of the agreement between the parties, which was that petitioner should carry the mails on the route indicated, and be entitled for such service to the price stipulated, for four years "unless Congress should sooner determine to have the mails carried on railroads." The language used by the Postmaster General in his letter accepting the bids, and the written portion of the printed contract, show clearly that such was the "meaning and intention" of the parties. Acting under this belief the petitioner made the necessary investment of capital for a faithful performance of the contract on his part. From the depositions of Messrs. Joline, Cunningham and Stelle in answers to the 5th and 6th interrogatories it appears that 8 four-horse teams, 2 coaches and 2 wagons were placed on each route, making for both lines 16 teams, 4 coaches and 4 wagons, besides extra wagons at a cost of \$12,466. The petitioner also insists that the Postmaster General had no right to put an end to the contract until Congress should authorise the mail to be carried on railroads, and until service of the stipulated notice. The petitioner is therefore not only entitled to his pay for the time he actually carried the mail, but for the whole period covered by his contract, or the damages which he sustained by the action of the Postmaster General in this regard. The act of July 7, 1838 conferred authority on the Postmaster General to put an end to the contract, but he never acted under it, and the case may be considered precisely as if no such authority existed; petitioner's profits were \$10,000 per annum, which were entirely destroyed by the taking away of his line which carried the passengers: see deposition of Joline, Cunningham and Stelle, witnesses of high character going to corroborate the above statement, and prove the heavy losses which the petitioner has sustained. If it be urged that sections 12 and 13 of the printed contract gave the Postmaster General a right to terminate the contract when he did, on route No. 951, it may be answered, that those sections being repugnant to and inconsistent with his agreement that "he would not" terminate the contract until an arrangement should

be made for carrying the mails on railroads under the authority of Congress, operated as a repeal of these sections, or justified the petitioner in considering it an independent covenant for the violation of which the United States are liable to respond in damages. The second section of the act "to establish certain post routes and to discontinue others," passed July 7, 1838, (eighteen months after the action of the Postmaster General) provides "That each and every railroad within the limits of the United States, which now is or hereafter may be made and completed shall be a post route, and the Postmaster General shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms, and not paying therefor in any instance more than twenty-five per centum over and above what similar transportation would cost in post coaches," approved July—, 1838.—(See Post Office Laws and Regulations, page 50, or Statutes at Large.) Under this act the Postmaster General was authorized to annul the contract, but no action was taken by him after its passage, and the petitioner is therefore not only entitled to the damages which he sustained previous to its passage, but for the whole time covered by his contract. It is recorded in the Digest of Justinian "That he who has hired his services to another is to receive his reward for the whole time, if it has not been his fault that the services have not been performed." It was not the fault of petitioner that the stipulated service was not performed, for he made every arrangement for carrying his agreement into effect, and continued the service until the contract was taken from him and turned over to R. F. Stockton, or the Camden and Amboy Railroad Company, which was long before railroads were established by law as post routes. The records of the Post Office Department contain the following:

"R. F. Stockton proposes to carry the mail on route No. 951, at the price it is now carried, say \$10,500. It is considered the interest of the department to accept the proposition. A. K."

R. F. Stockton agrees to carry the express mail and great mail consolidation in railroad cars, &c., for the lowest bid for an express mail, viz: \$14,000 added to the present cost of the great mail, \$10,500, conforming to the hours required by the department, and to carry into contract a bid for the second mail between New York and Philadelphia accepted at the last letting, at \$3,000, giving two daily mails between the two cities by railroad. It is deemed the interest of the department to carry this proposal into contract.

SEPTEMBER 16, 1836.

A. K.

It is apparent from the foregoing, that while the interests of the department were promoted by annulling the contract for route No. 951, the rights of the petitioner were entirely disregarded, and his pecuniary ruin effected. His claims Nos. 1, 2 and 3, having been rejected by the Postmaster General, it is not surprising that petitioner's claim for damages which he sustained by the depreciation of his property and loss of his passengers, was not by him urged when he had no means of enforcing his rights, and could only sue for them in the language of solicitation. The establishment of a Court of

Claims, an act so creditable to Congress and satisfactory to the people, has induced the petitioner to continue his efforts to obtain that relief which has hitherto been denied him, and to which he is most justly entitled.

Respectfully submitted,

J. D. WOODWARD,
Solicitor and Counsel for Petitioner.

FEBRUARY 25, 1857.

Argued and submitted, May 26, 1857.

Memorandum for reply to brief of United States Solicitor.

ALEXANDER M. CUMMING *vs.* The UNITED STATES.

I.

The decision of the Auditor of the Post Office Department (P. G. W.) on the 30th September 1848, on that part of petitioner's claim which was referred to that officer, is not conclusive, nor is it a bar to a recovery before this court, for there is nothing in the resolution of Congress which makes the decision of the Auditor or Comptroller conclusive. They should have carried out the intention of Congress as evinced by the reports of the committees, and were not justified in adopting a previous adverse decision. In the case of *Beaugrand vs. The United States*, Chief Justice Gilchrist says: "where the claimant upon petition makes out his case against the United States, the court grants relief notwithstanding a previous decision of the War Department that, the claimant could not receive the compensation sought under a resolution and act of Congress through the instrumentality of the Department on account of its existing regulations."

It is conceded by the solicitor that if the mails which accumulated at New York and Philadelphia had belonged to other routes than the one embraced by petitioner's contract, he might justly claim compensation for their transportation. Now, it will not be denied that a large part of the mail matter which petitioner transported belonged to other routes, and had accumulated in consequence of the storm. The necessity of this extraordinary service and expense of cutting out roads and forcing the United States mail through snow drifts was not foreseen, and the promise of payment on the part of Mr. Plitt, agent of the United States, ought to decide the question in favor of the petitioner.

See House report No. 169, first session Twenty-ninth Congress, and Resolution House of Representatives No. 12, same Congress.

II.

The claims for damages which the petitioner sustained in consequence of a violation of the contract by the Postmaster General were not submitted, nor have they been acted upon by the department

or by Congress. The solicitor says: "the claim for \$17,750 damages or any other amount of damage must depend upon the terms of the contract, and if it appear that the Post Office Department has not violated its terms, then the plaintiff has shown no legal ground to recover." We admit the correctness of this view, but show conclusively that the Postmaster General by his premature action has violated his contract, and subjected the petitioner to the heavy losses which he has sustained.

The petitioner is entitled to the actual value of his contract which was violated by the Postmaster General.—See case of *Masterdon vs.*

seventh Hill's Reports, p. —, and opinion of Attorney General Cushing, volume 6, page 516; also the testimony of Messrs. Joline, Cunningham and Stelle.

No. 5.

IN THE COURT OF CLAIMS.

Solicitor's Brief.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

The petitioner's claim rests on four distinct grounds, to wit:

1st. He claims for twenty-three days' continued service in the month of December, 1836, on route No. 951, at the contract price per quarter of \$2,625, making \$656 25.

2d. He claims extra compensation for transporting an accumulated amount of mail matter at Philadelphia and New York in the early part of January, 1836, in consequence of severe weather.

3d. He claims to have 10 per cent. added to his contract No. 952, because that amount was deducted from it in consideration that he was to receive contract No. 951, which was awarded to him, and afterwards annulled by the department before the time limited for its continuance.

4th. He claims \$15,750 damages on account of the annulment of contract No. 951.

The first three items of this claim were presented to the Post Office Department at different times for settlement, and disposed of adversely, which action we think proper and final, under the circumstances disclosed in the papers before the court. The claim of 10 per cent. was referred to Mr. Whittlesey, Auditor for the Post Office Department, and on the 6th day of December, 1841, he decided against it. (See his report, marked A, in which the facts are fully stated.) From the decision of the Auditor an appeal was taken to the First Comptroller, under the act of Congress of July 2, 1836, (5 S. L., page 81,) and said decision affirmed.—(See paper marked B.) By the 8th section of the said act of 1836, it is provided that there shall be appointed by the President, with the consent of the Senate, an Auditor of the Treasury for the Post Office Department, whose duty it shall be to

receive all accounts arising in the said departments, or relative thereto; to audit and settle the same, and certify their balances to the Postmaster General: provided, that if either the Postmaster General, or any person whose account shall be settled be dissatisfied therewith, he may, within twelve months, appeal to the First Comptroller of the Treasury, whose decision shall be final and conclusive. The two items for twenty-three days' continued service on route No. 951, and extra service in January, 1836, were also disposed of adversely by the Auditor, Mr. Whittlesey, on the 19th day of February, 1842. See papers C and D, in which the evidence connected with these demands is fully presented.

The petitioner being dissatisfied with the action thus had in his case, afterwards, to wit, on the 18th day of February, 1847, procured through Congress a joint resolution by which his said claims were referred to the Auditor of the Post Office Department, (Peter G. Washington,) and on the 30th day of September, 1848, he reported against them. See said report, marked E, in which will be found a copy of the resolution of Congress and also a full statement of the facts connected with the plaintiff's demand. From the character of said resolution, and the action had thereon, it seems to us that the petitioner is concluded, and that this court can afford no relief. See *Comegys and others vs. Vass*, 1 Peters, 212; also the decision of this court in the cases of *Letitia Humphreys vs. The United States*, *Thomas vs. The United States*, and *Roberts vs. The United States*. But assuming for the sake of argument that the case is not thus concluded, and that it is competent for this court to give relief, still we think the evidence shows no right in the plaintiff to recover. Proposals were invited by the Post Office Department to carry the mails on routes Nos. 951 and 952, being parallel routes from New York to Philadelphia, and the petitioner bid for them on the 15th of October, 1835, with a condition if he got both to take off 10 per cent. He did get both, and subsequently entered into written contracts to commence the service on the 1st of January, 1836. By the 13th section of these contracts it is provided that the Postmaster General may curtail the service, or dispense with it entirely, he allowing one month's extra pay upon the amount deducted. On the 6th day of December, 1836, the Post Office Department notified the petitioner of the annulment of his contract No. 951, and he was paid one month's extra pay. The claim for \$15,750 damages or any other amount of damage, must depend upon the terms of the contract; and if it appears that the Post Office Department has not violated those terms, then the plaintiff has shown no legal ground to recover. He may have sustained an injury by having his contract unexpectedly terminated, but that injury is not such as to give him a legal right to recover damages of the United States.

The claim for twenty-three days' continued service in the month of December, 1836, is a question of evidence, and the facts will be found fully collected in the report of Mr. Washington before referred to. The item or claim for extra labor, &c., in forwarding the mails from Philadelphia and New York in the early part of 1836, involves a

question of law. The regular through mails had accumulated at these points in consequence of snow and bad weather. They were the mails that belonged to the routes of the petitioner, and but for the bad weather, would have been carried regularly as they arrived, and no charge consequently made for them.

Had they belonged to other routes, and by the contingency referred to thrown upon the petitioner, then he might have justly claimed compensation for their transportation. If he was bound under his contract to carry said mails as they arrived, it was equally his duty to do so when they had accumulated, and no promise on the part of the Post Office agents, of extra compensation, could under the circumstances give the plaintiff a legal demand against the Government.

DANIEL RATCLIFFE,

Assistant Solicitor of the Court of Claims.

No. 6.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

Judge Blackford delivered the opinion of the court.

On the 16th of December, 1835, the claimant contracted with the Postmaster General to carry the United States mail from New York to Philadelphia and back daily, in four-horse coaches and railroad cars on route numbered 951. This contract was on condition that, in case any arrangement should thereafter be made under the authority of Congress, to carry the mails for the whole or any part of the route on railroads, then this contract should be annulled, or there should be a *pro rata* deduction, as the case might be. The compensation for the service was to be \$10,500 per annum, payable quarterly. The contract also contains the following provision: "That the Postmaster General may curtail the service or dispense with it entirely, he allowing one month's extra pay upon the amount deducted, in case he wishes to place on the route a higher degree of service than is contracted for, first offering the privilege to the contractor on the route of furnishing such higher service on the terms that can be obtained: or whenever he shall deem it expedient to lessen the service, or to leave such route or any part of it out of operation, or to convey the mail by steamboat or railroad cars; provided that reduction of compensation in consequence of reduction of service shall not exceed the exact proportion which the service dispensed with bears to the whole service."

On the same day, namely, the 16th of December, 1835, that the above contract was executed, the claimant entered into another contract with the Postmaster General for carrying the mail from New York to Philadelphia and back daily in four-horse coaches and railroad cars, on route numbered 952. The compensation for this service was to be \$8,991 per annum, payable quarterly. This other contract contains a condition relative to the annulment of the contract, and a provision as to curtailing the service or dispensing with it, &c., simi-

lar to those we have described as being contained in the contract respecting route number 951.

Both said contracts were to commence on the 1st of January, 1836, and to continue in force until the 31st of December, 1839, unless, &c.

Soon after the claimant commenced the performance of these contracts, namely, in January, 1836, there came on a severe snow storm which for several days prevented the arrival of the mails at Philadelphia from the south, and at New York from the north. On the arrival of those mails, a great accumulation of the mails at those cities took place. In consequence of such accumulation and the snow, the claimant was put to considerable extra expense and trouble in forwarding those mails, for which he charges in his petition, the sum of \$827 71. He was requested by the agent of the Post Office Department to make every exertion to forward the mails thus accumulated, the agent assuring him that the extra expense would be paid by the department. This agent says in his deposition that what he did in the matter was approved of by the department.

We think there can be no doubt but that, in a legal point of view, there is no foundation for this claim.

The claimant in consideration of large sums of money, undertook to carry the mails from New York to Philadelphia, and from the latter to the former, at stated times. The contract makes no provision for additional compensation in case there should be any such accumulation of the mails as above referred to, and the claimant took upon himself the risk of such accumulation. The circumstance that said agent requested the forwarding of those mails by the contractor, and assured him that he would be paid for it extra, and that what the agent thus did was approved of by the department can make no difference. The claimant did no more than he was bound to do by his contract of the 16th of December, 1835, and the government is not liable to pay him more for his services than that contract provides for. The promise here relied on for extra pay was without consideration. The sailors who during a storm made extraordinary exertions to save the ship on the captain's promise of extra pay, were entitled only to their ordinary wages, because it was their duty to do all they could to save the ship. The true doctrine is, that the mere performance of an act which the party was by law bound to perform, is not a sufficient consideration for a promise of extra pay for such performance.—(1 Selwyn's *Nisi Prius*, 43.) In an able report from the office of the Auditor of the Post Office Department against this claim, it is said: "Instances of double mails to be forwarded in consequence of the failure of a mail in a connecting line, from floods, storms, or accidents, have been of constant occurrence in the department without furnishing ground for additional compensation to the contractor. The accumulation in Mr. Cumming's case may have been greater than usual, but the excess does not affect the principle."

The next claim is for carrying the mail on said route 951 for twenty-three days—that is, from the 7th of December, 1836, to the end of that month. The charge for this service is \$700. The material facts are believed to be as follows:

The claimant's contract for carrying the mail on route 951 contains a provision to which we have referred, authorizing the Postmaster General to annul the contract at any time on allowing one month's extra pay. That officer in November, 1836, made an arrangement with the Camden and Amboy Railroad Company for carrying the great mail between New York and Philadelphia (the same that was then carried on route 951 by the claimant) from and after the 15th of November, 1836. On the 14th of that month the department made a proposition to Mr. Cumming (which he accepted) for an improvement on route 952, rendered necessary by the transfer of the great mail, and offered him \$3,009 per annum for such improvement; and, in a postscript to the letter, it is said: "You will continue carrying mails on routes 951 and 952 until otherwise ordered." Afterwards, on the 6th of December, 1836, the department wrote to Mr. Cumming as follows:

"SIR: An arrangement having been made with the Camden and Amboy Railroad Company for the conveyance of the great mail between New York and Philadelphia, and you having accepted the offer of the department for an improvement on route No. 952, which will supply certain of the towns in New Jersey with the mail for which they depended on route No. 951, the Postmaster General has directed that your contract on route No. 951 be annulled, and that you be allowed one month's extra pay."

It appears that the change of schedule, to meet the new arrangement, is dated the 27th of December 1836.

There is the following statement by the Auditor of the Treasury of the Post Office Department:

"Upon the arrangement being made with the Camden and Amboy Railroad Company, the great burden of the mail was removed from Mr. Cumming, whether on route 951 or 952. All the through mail was of course carried upon it, and nothing was left for Mr. Cumming but the mail to and from the intermediate offices. It is a mistake, therefore, to suppose that Mr. Cummings continued *the service* on 951 after the 7th December, 1836; in fact, he had ceased to carry the great mail as well as a portion of the mail usually sent on 952, from the 15th November, although he continued to be paid for both precisely as if he had carried the two entire mails to the former day, with the addition of one month's extra pay, which, I think, the Postmaster General might well have withheld under the stipulation in contract 951 before recited, if he had thought proper so to do."

We are of opinion that, according to the above stated facts, there is no legal ground for this claim. The contract as to route 951, was legally annulled by the Postmaster General's order of the 6th of December, 1836, and from the time of notice of that annulment, the claimant had no authority to carry any mails on that route. He contends that the direction in the postscript to said letter of the department of the 14th of November, 1836, continued to be in force till the new schedule aforesaid was delivered. But that is impossible. No more positive direction to the claimant to cease carrying the mails on route 951 could have been given than the absolute annulment long

after said postscript was written, namely, on the 6th of December, 1836, of the whole contract in regard to that route. If the claimant carried any of the mails on said route 951 after notice of said annulment, (and we believe he did continue to carry some of them till the last of December, 1836,) they were carried without authority, and he can have no legal claim for doing so. Individuals cannot create debts in their favor against the government without its consent.

Both the above mentioned claims were presented to the Postmaster General and rejected by him on the merits. Afterwards, in 1847, Congress by a joint resolution referred the same claims for determination to the Auditor of the Treasury for the Post Office Department, who, in 1848, gave a written decision against them.

The third claim is for the ten per cent. which was deducted from the \$9,990 mentioned in one of the proposals of the claimant for carrying said mails, which proposals were substantially as follows: To carry the mail on route 951 daily for \$13,125 per annum, or, if the proposal for route 952 was accepted, then 20 per cent. to be deducted from the \$13,125; also, to carry the mail on route 952 daily for \$9,990 per annum, or, if the proposal for route 951 was accepted, then 10 per cent. to be deducted from said sum of \$9,990. The proposals were accepted, and the beforementioned contracts entered into accordingly.

The claimant contends that upon the annulment of the contract for route 951 he became entitled to the \$9,990 per annum for carrying the mail on route 952 instead of the \$8,991 which he received.

The answer to this claim is, that the claimant contracted to carry the mail on route 952 for \$8,991 per annum, and there is no provision that he should have, under any circumstances, anything more for that service. As to the annulment of the contract for route 951, that was authorized by the express terms of that contract on payment of one month's extra pay, which payment was made.

The fourth claim is for \$15,000 damages, alleged to have been sustained by the claimant in consequence of the said annulment of the contract for route 951. But we have already shown that that annulment was legal, it being authorized by the express terms of the contract.

We have now noticed all the claims presented by the petition, and are of opinion that the claimant has no cause of action.

STATE OF ALABAMA

EXAMINED BY THE COMMISSIONER OF THE LAND OFFICE
AND THE ATTORNEY GENERAL

THE COMMISSIONER OF THE LAND OFFICE

REPORT

TO THE HOUSE OF REPRESENTATIVES
AND THE SENATE

FOR THE YEAR 1890-1891

STATE OF ALABAMA

1. The purpose of this report is to
show the results of the work of the
Commissioner of the Land Office
during the year 1890-1891.

2. The report is divided into two parts:
the first part contains a general
statement of the work of the
Commissioner of the Land Office
during the year 1890-1891.

3. The second part contains a detailed
statement of the work of the
Commissioner of the Land Office
during the year 1890-1891.

4. The report is divided into two parts:
the first part contains a general
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9. The second part contains a detailed
statement of the work of the
Commissioner of the Land Office
during the year 1890-1891.

STATE OF ALABAMA.

DECEMBER 7, 1858.—Reported from the Court of Claims, and committed to a Committee of the Whole House to-morrow.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

STATE OF ALABAMA *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Exhibits marked 1, 2, and 3, and A, B, C, D, E, F, G, H, I, transmitted to the Senate.
3. Statement of the claim in behalf of the State of Alabama.
4. United States Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said Court, at Washington, this 7th day of December,
A. D. 1858.

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

1.

Petition.

THE STATE OF ALABAMA *vs.* THE UNITED STATES.

To the honorable Judges of the Court of Claims:

Your petitioner, J. F. Jackson, agent of the State of Alabama, sheweth unto your honors that, by the third clause of the sixth section of the compact made with the State of Alabama on her admission into

the Union, 2d March, 1819, it is stipulated "that five per cent. of the net proceeds of the lands lying within the said Territory, and which shall be sold by Congress from and after the 1st day of September in the year 1819, after deducting all expenses incident to the same, shall be reserved" for internal improvements, "of which three-fifths shall be applied under the direction of the legislature thereof, (the State,) and two-fifths under the direction of Congress.

That by the third section of the act of 3d of May, 1822, it is enacted "that the Secretary of the Treasury shall from time to time, and whenever the quarterly accounts of public moneys of the several land offices in the State of Alabama shall be settled, pay three per cent. of the net proceeds of the sales of the lands of the United States lying within the State of Alabama," &c., "to such person or persons as may or shall be authorized by the legislature of the State of Alabama to receive the same."

That a subsequent act surrendered the two per cent. fund also to the State.

Under the foregoing stipulation and provision the United States made several adjustments of the accounts of lands sold in Alabama, and from time to time allotted to the State certain sums alleged to be the full amount due to the State. In 1848 the State had reason to distrust the accuracy of these settlements, and her legislature passed an act for the appointment of an agent to revise them. On this revision at the Treasury Department, it was ascertained and admitted that \$103,991 20, which had accrued to the State between the years 1820 and 1831, had not been paid, though unquestionably due; and this sum was therefore paid in January, 1850.

The State, pursuant to a late act of her legislature, now claims interest on this deferred payment. Freely admitting that, as a general rule, the United States are not liable to interest, and ought not to pay it, yet the State, in common with all the officers of the government, and every Congress since 1776, is also aware that there are exceptions to the rule. It is undeniable that cases occur in which the principle and usage demand the payment of interest by the United States as the due measure of justice. Numerous precedents exist of this practice.

Alabama claims that hers is a case of this peculiarity. She asks but that which is strictly just. Although injured by detention of moneys which were hers by purchase and payment of consideration, yet she would silently submit to the loss did she not also feel it right that she should appeal to national justice. To it she does appeal, not for a favor, but a *right*; a right, if purchase and payment on the one hand, withholding and injury on the other, combined with precedent, principle, and the highest usages of the country, *can* create a right against a power which is liable only through the spontaneous action of her own representatives.

Should this claim, however, fail to receive the anticipated recognition of the court, then the State presents another and entirely distinct claim; one which she would not advance but in case of the denial of her prior claim. This secondary one *none will contest*. It

is merely for repayment to the State of moneys which she overpaid to the United States, as interest on her bonds owned by the United States, through the error of the latter ; moneys which she did not owe, and which are, in truth, her property in the United States treasury.

DISTRICT OF COLUMBIA, *County of Washington.*

Personally appeared before me ———, an acting justice of the peace in and for said District, J. F. Jackson, agent for the State of Alabama, who says, on oath, that the facts set forth in the foregoing petition are true, according to the best of his knowledge and belief, and that said State is the owner of the claim mentioned in said petition, and that he has no interest in the same other than what he may be entitled to as agent and attorney for said State.

Sworn to and subscribed before me, this the ——— day of April, A. D. 1856.

Synopsis of contents.

Origin of claim; admission compact of State.

The States surrender waste lands and taxation for five years.

The States receive therefor 5 per cent. of proceeds of lands sold.

Strong reasons why per centage should be punctually paid.

The State unexpectedly held to abstain from taxation for ten to seventeen years.

Causes of this serious enlargement of a deprivation of tax income.

Manner in which the United States performed their part of compact.

Instances of their default to Alabama and other States.

Errors in accounts current of all the States.

The omission therefrom of one large item of proceeds altogether.

This omission, and the errors in the current accounts, only one part of default.

United States also withheld for twenty-two years admitted dues, (\$238,000,) but interest not claimed on this item.

Punctuality as much an essence of contract as *payment*.

The States entitled to their per centage the moment the purchase moneys are received in the treasury.

Reasons for it, from compact.

Reasons for it, from law.

Reasons for it, from general principle.

Nature of the present claim for interest on deferred payments.

But should this fail, the State then entitled to another and distinct one; for repayment of moneys paid to the United States in error, and which were not due.

Reasons why the United States should pay interest on deferred payments.

Difference between this and ordinary claims.

Its payment consistent with governmental usage and law; Attorney General's opinion.

And also consistent with congressional action; cases in point.

And also due to the State, because the measure of dealing with all the other States; instances of.

And also consistent with law of nations and American law; authorities therefor.

Difference between this and Galphin claim.

Conclusion.

Exhibits.

A—Claim arithmetically exhibited.

B—Statement of moneys erroneously paid by Alabama to the United States.

C—Mr. Wirt and Commissioner Meigs as to State taxation.

D—Mr. Taney as to right of officers to pay interest.

General statement of the claim of the State of Alabama on the United States.

By the third clause of the sixth section of the compact made with the State of Alabama on her admission into the Union, 2d March, 1819, it is stipulated "that five per cent. of the net proceeds of the lands lying within the said Territory, and which shall be sold by Congress from and after the 1st day of September in the year 1819, after deducting all expenses incident to the same, shall be reserved" for internal improvements, "of which three-fifths shall be applied under direction of the legislature thereof, (the State,) and two-fifths under the direction of Congress."

By the third section of the act of 3d May, 1822, it is enacted "that the Secretary of the Treasury shall from time to time, and whenever the quarterly accounts of public moneys of the several land offices in the State of Alabama shall be settled, pay three per cent. of the net proceeds of the sales of the lands of the United States lying within the State of Alabama," &c., "to such person or persons as may or shall be authorized by the legislature of the State of Alabama to receive the same."

A subsequent act surrendered the two per cent. fund also to the State.

Under the foregoing stipulation and provision the United States made several adjustments of the accounts of lands sold in Alabama, and from time to time allotted to the State certain sums alleged to be the full amount due to the State. In 1848 the State had reason to distrust the accuracy of these settlements, and her legislature passed an act for the appointment of an agent to revise them. On this revision at the Treasury Department, it was ascertained and admitted

that \$103,991 20, which had accrued to the State between the years 1820 and 1831, had not been paid, though unquestionably due; and this sum was therefore paid in January last.

The State, pursuant to a late act of her legislature, now claims interest on this deferred payment. Freely admitting that, as a general rule, the United States are not liable to interest, and ought not to pay it, yet the State, in common with all the officers of the government, and every Congress since 1776, is also aware that there are exceptions to the rule. It is undeniable that cases occur in which principle and usage demand the payment of interest by the United States as the due measure of justice. Numerous precedents exist of this practice.

Alabama claims that hers is a case of this peculiarity. She asks but that which is strictly just. Although injured by detention of moneys which were hers by purchase and payment of consideration, yet she would silently submit to the loss did she not also feel it right that she should appeal to national justice. To it she does appeal, not for a favor, but a *right*; a right, if purchase and payment on the one hand, withholding and injury on the other, combined with precedent, principle, and the highest usages of the country, *can* create a right against a power which is liable only through the spontaneous action of her own representatives.

Exhibit "A" sets out the particulars and arithmetical data of the claim. Should it, however, fail to receive the anticipated recognition of Congress, then the State presents another and entirely distinct claim; one which she would not advance but in case of the denial of her prior claim. This secondary one *none will contest*. It is merely for repayment to the State of moneys which she overpaid to the United States through the error of the latter; moneys which she did not owe, and which are, in truth, her property in the United States treasury. The particulars of this matter are given in exhibit B.

With this brief outline of the claim under consideration, we proceed to its statement "in extenso" in the following argument:

Argument.

The claim of Alabama, seeking a just compensation for wrong and injury, may at first seem a matter of exclusive interest to herself; but it will soon appear that, in asserting her own rights, she advocates also a great principle for all the States, but especially for those who, like her, have compacts with the United States containing mutual stipulations. Her claim presents grave questions. It involves the consideration of the extent of *practical* obligation imposed on the United States by their own compact; whether they may leave *their* covenants unperformed; and if unperformed, and injury results, whether the injured State is to receive any, and what, compensation.

The claim of Alabama arises under the compact of March 2, 1819,

made upon her admission into the Union. It contains the provisions common to new States. Among these are the mutual stipulations, which had their being in the early policy of the United States. This policy was suggested by the condition of the country at that day. The federal government found itself possessed of a vast, and, except by the Indian, an unpeopled territory. To encourage settlement on the public lands, to swell the treasury by their sale, and to build up new States, was deemed a wise policy. As Territories passed into States, and as star after star was added to the Union, public burdens decreased, and an additional pillar was placed under the common fabric.

Hence arose the policy found in the admission compacts of nearly all the new States, commencing with Ohio, in 1802. This policy consisted in something to be done by the State on the one side, and the United States on the other. The State was to surrender to the United States all waste lands, and to abstain from taxing public lands for five years after their sale.

As an equivalent therefor, the United States were to pay the State five per cent. of the net proceeds of land sales, for roads and other improvements—three-fifths to be expended by the State, and two-fifths by the general government. In some instances the whole five per cent. was under the control of the State.

The exemption from taxation for five years, and the pledge of one-twentieth of his purchase money to the making of improvements in his State, induced the emigrant to purchase, while the State's per centage stimulated her also to promote the sales of public land.

The wisdom of this policy is best commended by its success. It is continued to this day; and out of two hundred and forty-five millions of acres of public lands, \$94,571,339 have passed into the public treasury since the origin of the land system.

These mutual stipulations were obviously the *equivalents* for each other. The United States swelled her treasury at the cost of the State, but agreed to compensate her by a per centage. On the other hand, the State was enriched by this pledge of one-twentieth of the proceeds of land sales; but it was no gratuity; she *purchased* it, and dearly too. Taxation is the highest attribute of sovereignty. Its exercise is necessary to State existence; and in waiving it, the *State paid just that amount of bonus to promote the sales of public lands.*

For the performance of the covenants of the United States no security was given but that of their plighted faith. Nothing, however, was left to the faith of *the State*. Due performance by her was secured beyond the possibility of hazard. The prohibition of taxation, when assented to by Alabama, was an impassable barrier to its exercise. An attempt to tax earlier could not be enforced. But on the United States no such iron compulsion rested. *Good faith* was the only guaranty given to the State, and Alabama now cites that faith to respond to her appeal to the Congress of the nation.

The claim to this good faith is greatly strengthened by the fact that the "five years" of non-taxation (as stipulated in the compact) was unexpectedly swelled to a period ranging from ten to seventeen.

This extraordinary enlargement arose from the old system of sales. Lands were then sold on a credit—one-fourth paid down, the balance in two, three, and four years, with interest, and a year's grace was then added. Meanwhile the purchaser went into possession, but he did not get his patent, nor was the land deemed to "be sold" until full and final payment of his purchase money was made. The United States claimed, and enforced the claim, that the five years of non-taxation did not commence till then. If a State taxed earlier than five years after the purchaser's final payment, and sold for non-payment, the land office invariably refused to recognize the title of the tax-purchaser, and even to accept from him as a mere tax-purchaser the balance of purchase money. This doctrine and practice are set forth in Attorney General Wirt's opinion and Commissioner Meigs' report.—(See exhibit "C.")

Not one out of a hundred purchasers paid regularly. A great mass of overdue balances gradually accrued, and finally *relief laws* were enacted, extending the time of payment from 1809, year by year, to 1821. Then by other measures purchases were kept alive, so that the balances did not expire until 1831.

During this period, from the first relief law in 1809 to their expiration in 1831, large quantities of *settled* land in the fund States were deemed to be "*not sold*" until 1831, and on them the five years of non-taxation commenced to run only in that year. Yet all these lands had been settled and improved prior to 1820, and some of them ten years earlier. In fact, it is impossible to state with exactness the length to which the taxation limit enlarged itself. All that *can* be said is, that on all credit sales in Alabama the actual taxation limit was not less than ten nor more than seventeen years.

This unexpected and most serious addition to the State's part of the compact adds powerful weight to the claim she otherwise has for the prompt performance by the United States of the *compensating covenant*.

Having thus introduced the origin and nature of these compacts between the federal government and the fund States, and having exhibited the respective positions of the parties, it is proper next to inquire to what extent the United States have performed *their* covenants.

The facts—facts of record—compel the assertion that the United States have been in default, in continued and unjustifiable default, to most, if not to all, the fund States. They postponed their per centage, and when paid the amount was not the true sum. For many years the moneys due to States were retained in and enriched the national treasury. Errors of singular uniformity in favor of the United States and against the States characterize their *ex parte* accounts of this fund; and, finally, a true settlement was attained by the States only through an expensive agency.

These remarks apply with most force to the early days of the government. In modern times it is cheerfully conceded that the departmental officers have been, and now are, faithful and accurate in their accounts. But the evidence of facts justifies the charge that has

been alleged. Within the last four years five of the fund States appointed agents to revise their accounts. Four of these accounts have been fully restated, and one of them partially. Each restatement disclosed the same facts and the same result. Error was in every account. Just credits had been withheld, and balances were found due to all, to wit:

To Ohio	\$65,749 09
To Indiana	49,522 70
To Illinois	26,025 63
To Mississippi	2,576 89 (partial statement only.)
To Alabama	103,991 20

In the case of Alabama, the last of these revisions, a very serious fact respecting all these accounts was first ascertained and admitted. *It was the entire omission of a large item of the proceeds of sales.* Its magnitude may be inferred from the fact that in the case of Alabama it amounted to \$2,131,105 06. The proceeds thus omitted were payments made under the relief laws. When the price of land was reduced from \$2 to \$1 25 per acre, purchase moneys that had previously become forfeited on account of failure of full payment were in many cases restored, to enable the purchase to be completed at the reduced rate. The purchaser was also empowered to relinquish one or more tracts of land on which partial payments had been made, and to apply these payments to complete the purchase money on a tract retained. The payments thus made by restored forfeitures and relinquishments were wholly withheld from the account of sales; and although many millions of acres in the several States were paid for with moneys from these sources, the States received no per centage thereon. They were not even aware of such proceeds until the Alabama agency discovered and disclosed the fact. In consequence of it, Ohio, Indiana, Illinois, and Mississippi, have again restated, or are now restating, their accounts, to add to their former balance the sums which are also their due under the discoveries of Alabama. *She* is, therefore, entitled to the consideration of her sister States for the establishment of this common right.

The error that omitted these proceeds receives strong comment in the fact that out of four departments of the government which had jurisdiction of the Alabama principles,* not one officer questioned the propriety of inserting them.

These grave facts, perpetuated on the government records, sustain the allegation of default on the part of the United States in the performance of their fund obligations. And is there excuse for this failure to render the just account that is now acknowledged? The United States possessed all the requisites for a fair adjustment; lands, sales, officers, books, were all their own. Complexity there was none. A simpler matter of account cannot be proposed. Why, then, has the creation of an expensive agency been necessary to the attainment of justice by the States? This pregnant fact, taken in

* The Land Office, Secretary of the Interior, Attorney General, and First Comptroller.

connexion with the uniformity of error in favor of the United States, naturally suggests the inquiry whether there be any, and what, remedy for these many wrongs.

Before proceeding to this consideration, however, we will recapitulate our argument thus far.

We have shown—

1st. The origin of the “fund” compact, to wit, in the policy to promote the sale of public lands.

2d. That the *five per cent. fund* and the *non-taxation* were the equivalents for each other.

3d. That the compact, assented to by the State, effectually secured the performance of the non-taxation stipulation.

4th. That the United States so construed their land laws as to extend the five years of non-taxation to a period ranging from ten to seventeen years.

5th. That the States had no security from the United States other than their plighted faith for the performance of the compact on their part.

6th. That the claim of the State to this fund was enhanced by the unexpected and serious extension of the non-taxation period.

7th. That the United States had the adjustment of the account entirely to themselves.

8th. That the keeping of the fund account was a simple task; that palpable errors existed therein; among which was the entire omission of one distinct class of proceeds, amounting, in Alabama alone, to over two millions of dollars.

9th. That the facts sustain a case of grave and inexcusable default on the part of the United States.

It will be observed that the foregoing remarks are justified by admitted facts. The charge which they sustain is, the stating of erroneous accounts, and the omission therein of appropriate items. To this charge is now to be added another, and, if possible, a greater one, to wit, the withholding for many years the sums which their own accounts showed to be due to the State.

The compact with Alabama entitled her to an expenditure of 5 per cent. in improvements for her benefit—three-fifths at her own discretion, and two-fifths by the United States. The meaning of the compact clearly is, that the payments shall be made *immediately*—as fast as moneys for land sales come into the treasury. The language of the compact is, “that 5 per cent. of the net proceeds shall be reserved,” &c., not 5 per cent. *out* of the proceeds, or arising from them, but an actual hypothecation of one-twentieth of the original proceeds themselves. This language contemplated an immediate ownership in, and of course an *immediate use of*, the fund as soon as it could conveniently be paid over. That it was so understood by the parties is evident from the provision made by law for executing it. In May, 1822, an act executory of the compacts with Alabama and other fund States was passed, directing the Secretary of the Treasury “from time to time, whenever the quarterly accounts of public moneys of the several land offices should be settled,” to pay the 3 per cent. Therefore, in

order to *faithfully* perform the compact, *prompt* payment was requisite. Mere payment at some undefined future time would not satisfy it; nor would anything short of actual payment on the quarterly adjustment of the accounts.

This was also just on general principles. If the 5 per cent. was really to be an equivalent or substitute for taxation, its time of payment ought to take the place of the tax, thus to aid the State, when her treasury was deprived of its legitimate resource by taxation.

Every settlement on public lands brought with it increased burdens to the State. The new settler and his family swelled the population which claimed the protection of the State. In proportion to the population must be the domestic representation, the judiciary, police, roads, &c., and other incidents to society. All these are charges on the State. Her resources lie in *taxation*. When this right is unfettered, she can easily provide for her wants by an equable taxation on property. The increase of population, in this case, does not augment the public burdens, because the new settler tenders for taxation his new home. He brings with him the elements of a self-discharge of the cost which attaches to his citizenship. In such a case, all is well; but in that of *taxation fettered*, as in the case under consideration, the equilibrium is lost, and the State must look elsewhere for relief from the burdens of an increasing population. The compact professes to substitute for taxation 5 per cent. of the settler's payment; but it is no substitute, if susceptible of indefinite delay. Prompt payment—payment *at the very time* when the settler augments the public burdens, and when his property, otherwise taxable, is exempt under the contract, is the very essence and soul of its stipulations.

Thus sound principle concurs with the compact and with the law of 1822 in establishing immediate payment as one of the requisites called for by a faithful performance of the compact.

Besides this, however, mere payment does not satisfy an obligation, unless made on the day when due. Money is more valuable to a party at some periods than at others. In early years the State's means are small. She has much to do, and all to be done at once. Then her moneys are most beneficial, and the withholding of them the most injurious; and if wilfully withheld by an able debtor, she is fairly entitled to compensation, as the measure of the damage sustained by the detention, and of the benefit derived by the debtor from the use of her money.

Let us apply these principles to the case of Alabama. It has been seen that there was error and wrong in respect to her three per cent.—the portion payable to the State. Do we find in the performance of the two per cent. branch of the compact anything to redeem the evils of the other? Far from it. On the contrary, there the wrong is even deeper—the evil yet greater. The United States agreed to expend the two per cent. fund, and to do so as fast as received at the treasury. Yet for twenty-two years that fund lay in their treasury unexpended, save for the United States wants; and these the years of Alabama's greatest need of commercial facilities and her smallest means for their construction! Though error existed

in the three per cent. account, a part of *it* was paid, but not a dollar of the two per cent. until 1841 and 1842. Its amount as then adjusted at the treasury was \$238,405 21. This large sum, purchased by Alabama for a specific use by her lost taxation, had up to this period only enriched the United States.

It might be here asked, ought not the United States to render compensation for this withholding of a trust fund from the *cestui que* trust? but Alabama desires to prefer no claim that is not well assured by the highest principles of justice. She therefore passes by this item, waiving any claim upon it, and alluding to it only as proof of the serious default of the United States in the time of payment of acknowledged dues.

The claim she presents is limited to that portion of her purchased fund which was found due to her by the late restatement of her account in the Treasury Department, and paid in January last. It arose from introducing into the account the previously omitted payments for lands made by restored forfeitures and relinquishments. Their gross sum exceeded two millions of dollars. The State's percentage on it was \$103,991 20. She now claims interest on the deferred payment of this balance. For statement thereof see exhibit A. The precise amount of each payment, with the date of accrual to the State, are set out distinctly in the restated account. One half accrued in 1821, and the other half between that and 1831—an average period of twenty-five years. During these twenty-five years, Alabama often demanded of the United States her dues from this fund. Not receiving them, and unable to postpone her public improvements, she was finally coerced to raise the means by the issue of State bonds, bearing interest. The fact of her wants is thus evidenced. Meanwhile her non-taxation stipulation was extended from five to ten years, and in most instances to seventeen. Her waste lands passed to the United States, and she herself was held to the very letter of strict performance. And to crown the whole, is the fact that the United States, becoming possessed of the bonds of Alabama, issued in 1836, to the amount of one million six hundred and ninety-seven thousand dollars, which bonds were issued (in part) in consequence of the United States' default, have invariably demanded and enforced the prompt payment of semi-annual interest thereon, from their issue to this day. Yet during all this time the United States were in fact the debtor, and Alabama the creditor, to a certain extent.

This is a very important consideration. It alone is deemed to be decisive for the present claim. Let us look at the facts, and apply to them the common and indisputable rules of all dealing. In 1836 the United States became possessed of certain bonds of Alabama, and have ever since received interest on them at six per cent. But in 1836, and for many years prior, the United States owed Alabama \$103,991 20, (in round terms \$104,000.) Consequently, Alabama was entitled, in 1836, to have that sum endorsed on the bonds, and thereby to have so much of the principal absolutely and forever discharged.

The account on these bonds would then have stood thus:

Total amount of bonds.....	\$1,697,000
Less by amount due Alabama, say.....	104,000

Balance due, and on which Alabama is to pay interest...	1,593,000
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By the error of the United States this indisputable credit was not given; and in consequence Alabama was wrongfully held to pay interest on the face amount of her bonds, and has been thus held to pay from 1836 to the present time. Consequently, she has overpaid the legal interest by paying interest on this \$104,000, which she did not owe. The semi-annual interest on that sum, at six per cent., is \$3,120. Each payment thereof was wrong. Twenty-eight of them have been made. In a schedule hereto attached, marked exhibit B, is contained the account of these illegal overpayments.

If, therefore, the United States should repudiate altogether the payment of interest upon the balance due the State, yet here is another wholly distinct ground of claim by Alabama—it is to get back moneys wrongfully overpaid by her to the United States.

But it is contended that every good principle, and the usage of the United States, entitle her to interest on the \$104,000 for the entire period of its being due.

The United State always charge interest upon indebtedness as an indispensable element of account. They have so charged Alabama and the other fund States; and when the latter owed interest on their bonds in the United States' possession, the United States not only charged interest, but actually applied the State's per centage to discharge the interest; and that, too, although the per centage was not an open sum, but a trust fund, pledged to a specific use, and one in which every State in the Union had an interest and title as well as the indebted State.

Let these rules work both ways. As the United States charged Alabama interest on a presumed indebtedness, why should not they, in turn, pay her interest on an actual one?

As the United States charge the fund States interest, and detained their per centage to pay it, why should not the United States, in turn, pay interest on their per centage when wrongfully detained?

When Alabama paid interest wrongfully on money she did not owe, why should not the wrong be made right by the United States returning the money wrongfully received?

To answer these questions otherwise than affirmatively would be to sink the sovereignty of the States in that of the United States; for the United States cannot escape from the force of these established rules, except under the plea of the prerogative of sovereignty. Are the States less sovereign, or less seized of rights than the United States, the creature and representative of them all? Nay! It is they that are the real sovereigns, and the actual source of political life and power in the United States.

And why should not the United States pay, and Alabama receive interest? Her right to the principal was conceded, and it has been

paid. Her right to it twenty-five years ago has also been conceded. Her demand of it, the injury inflicted upon her by its detention, the errors of the United States, and their use of her money, are all alike unquestioned. Why, then, should not interest be paid? Interest is at once the measure of, and compensation for, the damage; the equivalent to the one party for detention, paid by the other for the use of money.

Why, then, should it not be paid? Is it that its payment in this case would conflict with the practice of the government? We will examine the subject, and prove that, so far from conflicting, it would be in strict conformity with its theory and practice under every administration.

The payment of interest by the United States has been often discussed, and has recently undergone so thorough an investigation that it is unnecessary here to go into the subject at large. A few cases will be given, and remarks made upon them, to show that the case of Alabama comes well within the rules which sustain the payment of interest, and is distinguished by strong characteristics from those cases which are without them.

The great bulk of opinion and decision respecting the payment of interest by the United States has been given under circumstances not applicable to the present case. Nearly all relate to the allowance of interest by the departments or executive officers. It is their power that is chiefly examined, and their allowance of interest that is canvassed and censured. Congress may be jealous of the exercise of so dangerous a power by merely executive officers, but Alabama seeks congressional and not departmental action.

Another marked distinction between this and ordinary cases is the fact that the latter are the claims of individuals, unknown to the government until presented, vouched, and allowed. They then, for the first time, become a debt against the United States.

The case of Alabama is in strong distinction. It is the claim of an equal and a sovereign. It arises under a treaty compact, (for these compacts are in the nature of treaties, and are entitled to the usages appurtenant to compacts between sovereignties.) Its existence is made known by the treaty. It is secured by law. It begins where the other class of claims ends, being founded on a debt against the United States under a compact, and a law executory of it. The United States are bound to take notice of it, and to provide for its due payment, as for any other national obligation, even without special demand. It is a question of right arising from a compact, and not an original demand. Therefore, rules properly applicable to individual cases fail to reach this. Nothing is common to the two, except that both are called by the common name of "claims."

The general rule applicable to claims may be gathered from the opinion of Attorney General Taney in Major Thorpe's case, (p. 841.) (Attorney General's opinion.) Its substance is, that there is no legal or constitutional objection to the allowance of interest by executive officers "*if justly due*," but that the cases are rare in which interest

can be "justly due," the United States being presumed to be always ready to pay. (For this opinion see exhibit D.)

It follows that the converse of the proposition in this opinion must be equally true, and, therefore, that there *may be* claims where interest is "justly due," and that the officers ought to pay interest on them. By referring to the opinion, it will be seen that this conclusion is inevitable from its reasoning, and that this class of cases are those in which the claim in proper shape is before the government, and delay of payment is caused by the default of the United States.

The test upon which the exemption of the United States from interest is made to depend is the fact, which of the parties delayed the payment of the principal? Who was in default? In the case under consideration, Mr. Taney reasons thus: The accounting officers are not forbid to pay interest if it is "justly due." But the United States are always ready to pay when a claim in proper shape is before them; *therefore* it can rarely happen that they are "justly chargeable with interest." Why? Because it is the fault of the claimant, says the opinion. Hence, then, it is the *fault* that decides the justice of an interest demand.

When, therefore, the United States *are* in fault; when the claim in proper shape *is* before them, and that the delay of payment is theirs, the case is one of those "rare" occurrences which the Attorney General deemed possible, though not likely, where the United States are "justly chargeable with interest;" and it becomes a subject of demand so just that even the accounting officers might pay it.

It scarcely needs to be remarked that the case of Alabama is precisely one of those rare exceptions. Demand for her due, apart from special demand, was always before the government under the obligations of a treaty compact and the provisions of an executory law. This continued notice and demand rendered any non-payment a clear case of laches. The United States themselves admit the perpetual obligation of this demand by making adjustments and payments from year to year of the per centage without special demand.

The claim is therefore one which, in the opinion of Chief Justice Taney, even the accounting officers ought to pay; and if so, then, *a fortiori*, is Congress bound to pay it.

We will now consider another case.

On page 542, Attorney General's opinions, is found an opinion of Mr. Wirt on certain reciprocal rights and duties of the government and the States. It was given on the claim of Virginia for interest, under an act of Congress which guarantied payment of her expenses during the war with Great Britain with interest. His reasoning is, that where the United States fail to do a thing to the performance of which they are bound, and the State does it from necessity, and obtains the means by borrowing on interest, the United States are bound to make the State good in principal and interest.

Here, again, Alabama presents a case of entire analogy. The United States were bound to pay her moneys for internal improve-

ments. They failed to do so. The improvements were indispensable to the State. The want of commercial facilities were as fatal to her interests as the presence of an invading enemy to Virginia. She was therefore compelled to make the improvements in self-defence. She borrowed money for the purpose, and paid interest for its use. According to Mr. Wirt, then, "the United States having failed to make such provision, and the State having to defend itself" (make the improvement) "by means of her own resources, the expenditure thus incurred forms a debt against the United States which they are bound to reimburse;" and as "the State has been obliged to borrow," "and pay interest, such debt is essentially a debt due by the United States, and both the principal and interest are to be paid by the United States."

We next invite attention to a remarkable case in which the United States interwove, in the code of her own polity and of national usage, the principle that the payment of interest was indispensable to the just satisfaction of an acknowledged debt, under circumstances and reasoning of striking applicability to the present case.

The case cited is found in Mr. Wirt's opinion (page 560) on the convention of St. Petersburg. This was an award by the Emperor of Russia on certain questions between England and the United States arising out of the war of 1812. It awarded "just indemnification" to the United States for slaves and property carried away during the war. The question was, whether the "*just indemnification*" included *interest* as well as principal, or whether the indemnity stopped at the naked value of the property. The British commissioner contended against interest. Mr. Wirt reasons thus:

"A wrong must be repaired in whole, if it would be indemnified; that a reparation of one-half or three-fourths would not be enough; that the taking away the property originally was wrong, and the continuance of the possession of the property was an additional wrong; that the property was detained eleven years in violation of a treaty; that it is not consistent with the usage of nations to redress wrong by a mere return of the naked value, without interest, even of belligerent nations, far less of friendly powers;" and he concludes by deciding that interest is a necessary part of the indemnity.

The facts of this case are substantially those of Alabama, and the reasoning of Mr. Wirt applies with unanswerable strength. There was a treaty compact between the United States and Great Britain; so between the United States and Alabama. Great Britain violated the one, the United States the other; one by commission, the other by omission. The one did what she ought not to have done, (take property;) the other left undone what they ought to have done, (pay money.) In both cases there was equal transgression. The United States claimed to be made whole by Great Britain; Alabama now claims the same of the United States. The original act of Great Britain was decided by the award of the Emperor of Russia to be a wrong committed in 1815. The original act of the United States was decided by her own officers, in their official capacity, to be a wrong committed in 1821. Great Britain and the United States both admit

the wrong, and offer reparation by payment of the naked value at the perpetration of the wrong, *i. e.*, the principal. But Mr. Wirt says the *detaining* was an equal wrong with the original act; that the parties lost the use of their property, and that the only proper indemnity is reparation for the *whole* of it—for the original and the *continuing* wrong—and that interest is a necessary part of the indemnification under the law of nations. Accordingly, the United States demanded interest of Great Britain, and finally enforced it—enforced it as the due measure of national redress of wrong, as established by usage and principle. And such measure of redress Alabama confidently expects to receive from the United States. It is not to be believed that the United States will now *reverse* great national principles for which they successfully contended, because of their own *reversed position* from *creditor* to *debtor*. Were the United States to reverse a great principle thus solemnly and conspicuously settled, and to reverse it here where its rule is against them, such antagonist action would necessarily impair confidence in the faith of the government, and destroy that fixity which is so essential in the principles and procedure of government.

The foregoing cases show that the claim of Alabama for interest is well sustained by the principles and usage of our government.

We will now adduce another class of cases to show what has been the action of Congress.

As might be expected from a body possessing the power, almost unlimited, over claims, its action will be found more liberal than that of mere executive officers. Liberality, generosity, and an enlarged equity, no less than strict justice, characterize their acts.

The cases cited will be those only in which interest has been paid as the due measure of relief.

1st. Where money is the basis of relief, interest is added as a part of the remedy.

Smith and Gates had purchased lands of the United States. Title proved defective. Principal and interest were allowed.—(U. S. S., vol. 6, p. 72.)

Joshua Sands, collector, was sued for vessel seized; he claimed for damages of the United States; he was allowed interest and costs.—(Vol. 6 U. S. S., p. 150.)

John Thompson; interest allowed on money advanced, and also on services.—(Vol. 6, p. 208.)

William Tharpe; interest allowed on claim for services and bill of charges.—(Vol. 6, p. 476.)

Thomas Richardson, a sutler, to protect himself, he took out letters of administration to soldiers who owed him. Repaid *with interest*, to extent of funds due to soldiers.—(Vol. 6, p. 558.)

Marius G. Gilbert; the same.—(Vol. 6, p. 621.)

2d. In cases of accounts with the United States, and also where a balance is found against the United States, Congress pays interest. (Such is the case of Alabama.)

In 1802, Arthur St. Clair; his accounts referred to accounting officers, and balance paid with interest.—(Vol. 6, p. 16.)

Stephen Sayre, 1807; his account settled and interest allowed.—(Vol. 6, p. 65.)

T. Barclay, 1808; the same.—(Vol. 6, p. 72.)

Wm. Baynham, 1810; the same.—(Vol. 6, p. 89.)

Moses Young, 1810; the same.—(Vol. 6, p. 89.)

J. Wheaton, 1806; balance due him by award, \$1,600; interest from 1807 added.—(Vol. 6, p. 166.)

R. Hills, 1819; account settled and interest paid.—(Vol. 6, p. 231.)

Wm. Otis, 1829; the same.—(Vol. 6, p. 396.)

3d. In case of unjustified detention of property by the United States, Congress pays interest to compensate for the detention. *A fortiori*, is interest due for detention of money, it being always the subject of interest, but property rarely.

John Coles, 1802; vessel detained at Gibraltar by American consul; damages and interest paid.—(Vol. 6, p. 51.)

D. Colton, 1809; vessel detained; damages and interest paid.—(Vol. 6, p. 80.)

4th. Interest is a necessary part of indemnity.

N. Green, indemnified in a certain sum, and interest paid.—(Vol. 6, p. 9, 28.)

5th. When the claim is founded on an equivalent rendered to the United States, and the United States have received value therefor, they will pay the claim with interest, even though it be barred by a contract fully performed.

Congress disregards every barrier to a compensation which is just in principle.—(See case of John Steinman and others.)

Steinman and others, in 1813, manufactured arms for the United States, under a contract accompanied by a specimen. They delivered the arms and were paid the stipulated price. In 1826, they petitioned Congress for an additional allowance, because the arms were better than was required by the contract; also, because the government had paid other contractors a higher price for same kind of articles under contracts.

Of course these petitioners had no pretence of right on which to found their claim. They had made their contract and received the stipulated price; 13 years passed away since the transaction was concluded. It rested entirely on equitable principles. But Congress entertained the claim and passed an act not only giving them the increased rate, but also interest on it from 1813.—(See vol. 6, U. S. S., p. 345.)

The cases last cited embrace the cardinal points of the Alabama claim. It, like them, is for interest. The basis of it (like point 1st) is money; like point 2d, it is a balance on account stated with the United States; like point 3d, it is a detention by the United States, but of money instead of property; like point 4th, interest is necessary to indemnify the State for injury and for interest paid by the State; and, like point 5th, the claim is founded on an ample equivalent rendered by her to the United States by the surrender of taxation.

The comparison of the cases of Steinman and Alabama is this: both rendered value to the United States under contracts; to Steinman the

United States performed in full; to Alabama they failed. Steinman bargained with his eyes open and a sample in his hand, was paid his price in full and acquiesced for thirteen years; yet Congress overlooked all but the original value, increased the price and added interest to boot. In the case of Alabama, no contract bars her. True, a contract there is, but it throws its heavy weight in her favor, and not against her.

We shall now cite a class of cases in which the United States have invariably paid interest to the States as the "just compensation" for their performance of acts which it was the duty of the United States to do. This legislative action practically illustrates and sustains the principles laid down by Mr. Wirt in the case of Virginia, and quoted on page ——. It conclusively establishes the principle that in all cases of suitable emergency, the States may discharge duties which of right pertain to the United States alone, but which they omit through laches or necessity.

But it shows more. It establishes also the principle contended for, that the States as sovereigns in themselves and component parts of the common sovereignty representing their Union, stand on a platform of equality when respectively dealing with the united body; that prerogatives which attach to sovereignties in their intercourse with individuals, are lost in the co-extensive privileges of the equal. Accordingly we find that in the accounts of the latter class, the ordinary rule that governs adjustments between individuals prevails. In their cases—the cases of equals—interest unless waived by law or contract, attaches to non-payment as an indispensable consequence. In a 2d class of cases—that of sovereigns and individuals—the equality of condition is lost, and with it the rule also. But in the 3d class the equality is restored and with it the rule is again established.

And still more, this legislation in connexion with the preceding cases shows how vast the field is from which spring the elements of demand for interest, as the due measure of satisfaction for the honor and faith of the United States. They exhibit the extent of exception to the rule, generally deemed so fixed, that the United States never pay interest, and prove that like every rule it has its just exceptions.

March 3, 1825, vol. 4, U. S. S., page 132.—Interest to Virginia on expenditures for the United States during the war of 1812.

May 13, 1826, vol. 4, U. S. S., page 161.—The same to Maryland.

May 20, 1826, vol. 4, page 175.—The same to Delaware.

May 20, 1826, vol. 4, page 177.—The same to Baltimore.

May 22, 1826, vol. 4, page 193.—The same to New York.

March 3, 1827, vol. 4, page 240.—The same to Pennsylvania.

March 22, 1832.—The same to South Carolina.

In addition to these cases are two in which the present Senate passed bills giving interest to Georgia and Maine.

A large mass of precedent has now been shown in every department of the government, all concurring in a common principle. The opinions of Attorney Generals Wirt and Taney, the practice of the government in its foreign and domestic relations, the legislation of Congress and the dealings with the States of the Union, harmonize

in establishing that the State of Alabama is entitled to interest in a case so analogous to the numerous instances cited.

It only remains to be seen what the law of nations and the policy of our own laws suggest as applicable to the case. But two authorities will be cited. Let them speak for themselves.

Vattel says: "All the promises, the conventions, all the contracts of the sovereign are naturally subjected to the same rules as those of private persons."—(Vattel, lib. 2, chap. 14, p. 213.)

The eminent jurist, Justice Story, says, in *Thorndike vs. United States*, (1 Mason's Rep., 20 :) "If the present were a contract between private citizens, there can be no doubt that the court would be bound to give interest upon the contract up to the time of payment; and if by law the amount due on the contract could be pleaded as a tender or a set-off to a private debt, it would be a good bar in the full extent of the principal and interest due at the time of such tender or set-off. Nay, more: if the note or promise were made by a citizen to the government, the latter might enforce its claim to the like extent. Can it make any difference in the construction of the contract that the government is the *debtor* instead of the *creditor*? In reason, in justice, in equity, it ought to make none, and there is not a scintilla of law to justify any. If a suit could be maintained against the government I do not perceive why it would not be as much the duty of the court to render judgment in such suit for the principal and interest, in the same manner and to the same extent, as it would in the case of private citizens. The United States have no prerogative to claim one law upon their own contracts as *creditors*, another as *debtors*. If as *creditors* they are entitled to interest, as *debtors* they are bound also to pay it."

The force and propriety of this reasoning must strike every one. Were the United States then to refuse interest to Alabama they would do that for which Mr. Justice Story says "they have no prerogative," and far less have they law. As creditors enforcing interest from Great Britain under treaty and from the States under contract, but as debtors refusing to pay it, though their debt is admitted, and the instruments are the same, what would it be but to assume under the iron hand of power, the position for which the great jurist expressly declares there is neither law nor prerogative?

Such action by the United States cannot be contemplated. A dignified and honorable nation, it only needs to know the right to do it; and in their dealing with Alabama they will doubtless conclude, when they know the facts, that, in the jurist's words, "as creditors they have taken interest of the State, as debtors they are bound also to pay it."

To close this branch of the argument it only remains to notice the contrast between this and a recent case, the subject of much discussion.

The Galphin claim was originally against the Indians; then against Great Britain; next against Georgia; but, in the opinion of its opponents, never a just one against the United States. It did not originate against them, and if it lay against them at all it was only by

implication. Thus the first great element necessary for an interest claim was here *uncertain*, i. e. the actual right of claimant to the principal from the United States.

Greater contrast cannot exist than does exist in the foregoing respects between the Galphin and the Alabama claims. The latter arises from a contract with the United States—is the equivalent for a value paid to the United States. The Galphin principal was paid under a late act of Congress—as a matter of grace, say some; but, at any rate, as a matter of discretion. Alabama's principal accrued under a treaty contract, and was paid as a *right*, without congressional aid.

But the gravamen of the Galphin case was that *executive officers* paid interest without a special enactment by Congress. Its opponents do not allege that interest is not to be paid by the United States under any circumstances, or that *Congress* cannot order its payment, but they object to its unauthorized payment by executive officers as an undue exercise of power.

It is to *Congress* Alabama comes and appeals for justice. She supplicates not for *favor*, but asks for *rights*—rights admitted and long withheld; and she comes with clean hands. *Her* faith to the nation and to individuals is untarnished. She has never been behind her sister States in upbuilding and sustaining the institutions of our country, and in the early policy of encouraging the sales of public lands she has submitted to more sacrifices than any of the land States.

Would it comport with the dignity of a great nation to withhold justice in the present case? The United States demanded and received from Great Britain that justice in a similar case; they exact it from the States of the Union; they enforce it from their own citizens in all dealings with them. Is it consistent, is it *right*, that a rule should exist *always* in *favor* of a nation, but *never* against her?

Are the great principles of justice to be powerless when a nation is the subject of their application? And is this Union to protect itself behind the doctrine of the English crown, that “the King can do no wrong?”

Nay, rather let the contrary doctrine obtain; let justice be ever most inflexible, fair dealing most pure, and honor most scrupulous in the dealings of a nation, herself the asserter and the exemplar of an unswerving code of principles, as the only foundation on which a nation's *true* prosperity and glory can rest.

Respectfully submitted.

JEFF. F. JACKSON,
Agent for the State of Alabama.

WASHINGTON, June 25, 1850.

APPENDIX.

*Exhibit A, showing the interest which the State of Alabama now claims.
(See the last column of statement.)*

The following statement exhibits the sums paid for lands in Alabama, with the dates when paid, but which were withheld from the fund account of the State until the restatement thereof— All these facts being taken from the official statement of the Treasury, now of record there.

It also exhibits the State's percentage on these omitted payments ; the period for which it was unpaid, and the interest thereon at 6 per cent.

ST. STEPHEN'S DISTRICT.

Period when sales were made.			Amount of purchase money paid in each quarter.	State's percentage thereon, 5 per cent.	Amount of interest at 6 per cent. on State's portion, from date when due to June 30, 1850, and of 2d quarter.	
Year.	Quarter.				Period.	Amount.
					<i>Yrs. Mos</i>	
1821	3d qr., ending	Sept. 30	\$80,853 84	\$4,042 69	28 9	\$6,973 60
1822	3d....do.....	Sept. 30	879 76	43 98	27 9	72 98
1823	3d....do.....	Sept. 30	163 84	8 19	26 9	13 11
1824	3d....do.....	Sept. 30	4,578 97	228 94	25 9	353 55
1824	4th....do.....	Dec. 31	6,199 86	309 99	25 6	464 24
1825	1stdo.....	March 31	49,553 11	2,477 65	25 3	3,753 41
1825	2d....do.....	June 30	9,816 25	490 81	25 0	736 00
1826	4th....do.....	Dec. 31	447 84	22 39	23 6	31 49
1827	1stdo.....	March 31	610 49	30 52	23 3	42 55
1827	2d....do.....	June 30	8,840 92	442 04	23 0	609 96
1827	3d....do.....	Sept. 30	4,812 56	240 62	22 9	328 28
1828	3d....do.....	Sept. 30	310 99	15 54	21 9	20 23
1829	1stdo.....	March 31	1,449 10	72 45	21 3	92 44
1829	2d....do.....	June 30	7,214 02	360 70	21 0	454 44
1829	3d....do.....	Sept. 30	5,015 03	250 75	20 9	312 08
1831	1stdo.....	March 31	689 87	34 49	19 3	39 65
1831	2d....do.....	June 30	2,845 25	142 26	19 0	162 07
1831	3d....do.....	Sept. 30	3,746 33	187 31	18 9	210 57
			188,028 03			14,670 65

STATEMENT—Continued.

CAHAWBA DISTRICT.

Period when sales were made.			Amount of purchase money paid in each quarter.	State's percentage thereon, 5 per cent.	Amount of interest, at 6 per cent., on State's portion, from date when due to June 30, 1850, end of 2d quarter.	
Year.	Quarter.				Period.	Amount.
					<i>Yrs. mos.</i>	
1821	3d qr., ending Sept.	30	\$249,643 40	\$12,482 17	28 9	\$22,107 74
1822	3d....do.....Sept.	30	2,566 43	128 32	27 9	213 40
1823	3d....do.....Sept.	30	285 48	14 27	26 9	22 74
1825	3d....do.....Sept.	30	194,815 60	9,740 78	24 9	14,464 89
1827	2d....do.....June	30	60,404 78	3,020 23	23 0	4,167 83
1829	2d....do.....June	30	41,753 46	2,087 67	21 0	2,630 46
1831	1st...do.....March	31	3,638 31	181 91	19 3	210 01
1831	2d....do.....June	30	38,638 00	1,931 90	19 0	2,202 29
			591,745 46			46,019 36

HUNTSVILLE DISTRICT.

1821	3d qr., ending Sept.	30	658,489 25	32,924 46	28 9	56,794 48
1822	3d....do.....Sept.	30	4,179 43	208 97	27 9	347 71
1824	3d....do.....Sept.	30	280 18	14 00	25 9	21 63
1824	4th....do.....Dec.	31	1,078 27	53 91	25 6	82 36
1825	1st...do.....March	31	51,986 08	2,599 30	25 3	3,937 73
1825	2d....do.....June	30	20,773 99	1,038 69	25 0	1,558 00
1826	3d....do.....Sept.	30	9,077 43	453 87	23 9	646 71
1826	4th....do.....Dec.	31	3,695 42	184 77	23 6	260 38
1827	1st...do.....March	31	3,833 96	191 69	23 3	267 37
1827	2d....do.....June	30	30,326 48	1,516 32	23 0	2,092 31
1827	3d....do.....Sept.	30	41,315 44	2,065 77	22 9	2,819 64
1828	2d....do.....June	30	75	03	22 0	04
1828	3d....do.....Sept.	30	79 33	3 96	21 9	4 90
1828	4th....do.....Dec.	31	375 52	18 77	21 6	24 08
1829	1st...do.....March	31	3,431 93	171 59	21 3	218 66
1829	2d....do.....June	30	57,265 67	2,863 28	21 0	3,607 59
1829	3d....do.....Sept.	30	30,013 29	1,950 66	20 9	2,428 34
1830	4th....do.....Dec.	31	150,896 43	7,544 82	19 6	8,827 26
1831	1st...do.....March	31	16,395 70	819 78	19 3	946 71
1831	2d....do.....June	30	227,944 34	11,397 21	19 0	12,992 77
1831	3d....do.....Sept.	30	30,892 60	1,544 63	18 9	1,737 55
			1,351,331 57			99,616 22
	St. Stephen's					14,670 65
	Cahawba					46,019 36
	Grand total					160,306 23

EXHIBIT B.

Schedule showing the moneys overpaid to the United States by Alabama.

Total principal on which the United States charged interest from 1836 to present time	\$1,697,000 00
Deduct amount due at that time by the United States to Alabama, it being a good set-off to so much of the principal, but not endorsed on the bonds.....	104,000 00
True amount of State indebtedness.....	<u>1,593,000 00</u>

And on which sum only Alabama ought to have paid interest.

Amount of interest paid annually by the State, being 6 per cent. on \$1,697,000.....	101,820 00
Amount of interest on \$1,593,000, the <i>true</i> principal.....	95,580 00
Difference between the true interest and the amount paid.....	<u>6,240 00</u>

This excess of interest, \$6,240, was wrongfully paid by Alabama from July, 1836, to the present time in semi-annual payments. The following table exhibits the account thereof against the United States, on the usual principles of rectifying an erroneous payment of money.

Date of overpayment.	Amount overpaid.	Interest at 6 per ct. on amount overpaid from date of overpayment to July 1, 1850.	Period for which interest is calculated.
			<i>Years. Mos.</i>
July 1, 1836.....	\$3,120 00	\$2,620 80	14 0
January 1, 1837.....	3,120 00	2,527 20	13 6
July 1, 1837.....	3,120 00	2,433 60	13 0
January 1, 1838.....	3,120 00	2,340 00	12 6
July 1, 1838.....	3,120 00	2,246 40	12 0
January 1, 1839.....	3,120 00	2,152 80	11 6
July 1, 1839.....	3,120 00	2,059 20	11 0
January 1, 1840.....	3,120 00	1,965 60	10 6
July 1, 1840.....	3,129 00	1,872 00	10 0
January 1, 1841.....	3,120 00	1,778 40	9 6
July 1, 1841.....	3,120 00	1,684 80	9 0
January 1, 1842.....	3,120 00	1,591 20	8 6
July 1, 1842.....	3,120 00	1,497 60	8 0
January 1, 1843.....	3,120 00	1,404 00	7 6
July 1, 1843.....	3,120 00	1,310 40	7 0
January 1, 1844.....	3,120 00	1,216 80	6 6
July 1, 1844.....	3,120 00	1,123 20	6 0
January 1, 1845.....	3,120 00	1,029 60	5 6
July 1, 1845.....	3,120 00	936 00	5 0
January 1, 1846.....	3,120 00	842 40	4 6
July 1, 1846.....	3,120 00	748 80	4 0
January 1, 1847.....	3,120 00	655 20	3 6
July 1, 1847.....	3,120 00	561 60	3 0
January 1, 1848.....	3,120 00	468 00	2 6
July 1, 1848.....	3,120 00	374 40	2 0
January 1, 1849.....	3,120 00	280 80	1 6
July 1, 1849.....	3,120 00	187 20	1 0
January 1, 1850.....	3,120 00	93 60	0 6
Amount overpaid.....	87,360 00	38,001 60	
Interest thereon.....	38,001 60		
Total.....	<u>125,361 60</u>		

EXHIBIT C.

Attorney General Wirt's letter to Mr. Meigs, Commissioner of the Land Office, November 4, 1840, page 1387, Attorney General's opinions.

This opinion refers to taxation in Illinois. It states the five years' exemption from tax of lands sold after January 1, 1819, and that the State considered lands on which one-fourth of the purchase money had been paid, as subject to the exemption provision. He says: "The doubt is whether the sale must not be consummated by the payment of the whole of the purchase money and the passing of the patent before the lands can be said to be sold.

"If so, lands entered before the 1st January, 1819, and one-fourth of the purchase money paid on them, if standing in this predicament at that day, are still exempt from taxation, because the sale is not complete.

"If, however, the United States have recognized the liability of lands thus circumstanced to be taxed, by issuing patents to purchasers under the sale for taxes, there is an end of the question. Will you say what the practice is," &c.

Mr. Meigs replies as follows:

"It has been my opinion that the lands sold by the United States in any territory, prior to its admission into the Union, were exempt from taxes for five years from the time of sale. The lands were sold on a credit of five years, and if not paid for in that time would revert to the United States. Under this opinion I certainly would not issue a patent to a purchaser at a tax sale, even if he tendered the balance due to the United States, unless he produced an assignment from the original purchaser.

"I do not know that a single application has been made for a patent by a purchaser at a tax sale; if such application has been made and a patent issued, it issued to him as assignee of the original purchaser on production of the assignment, and without any regard to the tax sale."—(Page 15, Pub. Lands, vol. 2.)

EXHIBIT D.

Mr. Taney to the Secretary of War, September 10, 1831, page 841.

"I am not aware of any statute of the United States that forbids the Secretary of War, or the accounting officers, to allow interest to a claimant, if it should appear that interest is justly due to him. As the United States are always ready to pay, when a claim is presented supported by proper vouchers, it can rarely, if ever, happen that they are justly chargeable with interest, because it is the fault of the claimant if he delays presenting his claim, or does not bring forward the proper vouchers to prove it and justify its payment. But if in

Major Tharp's case, or in any other, the Secretary of War, upon a review of the whole evidence, should be of opinion that interest is justly due to the claimant, I think he may legally allow it."

No. 4.

IN THE COURT OF CLAIMS.

ON PETITION OF THE STATE OF ALABAMA.

Brief of United States Solicitor.

This case involves only the question of interest, and is the same question decided in Todd's case, and which was discussed in my brief in the Florida claim of Letitia Humphreys, and which is also discussed by Attorney General Cushing in vol. 7, page 523, in case of Colmesnil.

M. BLAIR.

No. 5.

COURT OF CLAIMS.

The STATE OF ALABAMA vs. The UNITED STATES.

LORING, J., delivered the opinion of the Court.

By the provisions of the act of Congress of March 2, 1819, (3 Stat. at Large, 489,) entitled "An act to enable the people of the Alabama Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," it was provided, section 6, proposition 5th: "That five per cent. of the net proceeds of the lands lying within the said Territory, and which shall be sold by Congress from and after the first day of September, in the year one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for making public roads, canals, and improving the navigation of rivers; of which three-fifths shall be applied to those objects within the said State under the direction of the legislature thereof, and two-fifths to the making of a road or roads leading to the said State under the direction of Congress."

And by the act of Congress of May 3, 1822, c. 46, § 3, 3 Stat. at Large, 674, it was enacted "that the Secretary of the Treasury shall, from time to time, and whenever the quarterly accounts of public moneys of the several land offices in the State of Alabama shall be settled, pay *three per cent.* of the net proceeds of the sales of lands of the United States lying within the State of Alabama, which, since the first day of September, in the year one thousand eight hundred and

nineteen, have been, or hereafter may be, sold by the United States, after deducting all expenses incident to the same, to such person or persons as may or shall be authorized by the legislature of the said State of Alabama to receive the same, &c.; which sum or sums thus paid shall be applied to making public roads and canals, and improving the navigation of rivers within the said State of Alabama, under the direction of the legislature thereof," &c.

And by the act of Congress of September 4, 1841, c. 16, § 17, 5 Stat. at Large, 452, "the two per cent. of the net proceeds of the lands sold by the United States in the State of Alabama since the first day of September, eighteen hundred and nineteen," &c., was relinquished to the State of Alabama by the United States, to be applied to the purposes of internal improvement specified in the act, under the direction of the legislature of Alabama.

By these acts of Congress the State of Alabama became entitled to receive five per cent. of the proceeds of the lands lying in her territory and sold by the United States "*from and after the first day of September, in the year eighteen hundred and nineteen.*"

From 1821 to 1846 accounts of the proceeds of the lands sold were adjusted and settled between the United States and the State of Alabama, according to the construction of the law then held by the Treasury Department—that Alabama was entitled to her statute proportion of the proceeds of sales begun or entered upon *after* the first day of September, 1819, and not of sales begun before and completed *after* that day. In 1846 a different construction of the law was adopted by the department, and it was held to entitle Alabama to her proportion of the proceeds of sales concluded *after* the 1st of September, 1819, though begun and entered upon *before* that day.

On this new construction the accounts between the parties were revised, and it was ascertained that on such construction Alabama should have received \$103,991 20 more than had been paid to her; and this amount was paid by the United States to Alabama on the 16th of February, 1850.—(Exhibit 1, page 3.)

The State of Alabama alleging that the said amount of \$103,991 20 accrued to her between the years 1820 and 1831, claims interest upon it, as specified in Exhibit A, annexed to her petition, and amounting to \$164,306 23.

It is admitted by the petitioner that by the general rule the United States are not liable for interest; but it is claimed that this case should be made an exception. The facts of the case furnish no reason for doing so; for it is not a case of wilful default or of neglect on the part of the United States. If that is admitted, which the argument assumed, that the original construction of the law was erroneous, then the non-payment of the \$103,991 20 resulted from a mistake which, for all that is shown, was mutual between the parties. That mistake was rectified as soon as it was known, and the money was paid as soon as it was demanded. On these circumstances no contract for interest can be implied against the United States, who in all cases are *presumed* to contract to pay without interest; and in such cases interest is not payable by the rule of the government advisedly established.—

(Opinions of Attorney's General, vol. 7, p. 523, case of John D. Colmesnil.)

After presenting this claim for interest on the sum of \$103,991 20, the petition of Alabama proceeds thus: "Should it (the claim for interest) fail to receive the anticipated recognition of the Court, then the State presents another and *entirely distinct claim*, one which she would not advance but in case of the denial of her prior claim. This secondary claim none will contest. It is merely for repayment to the State of moneys which she overpaid the United States through the error of the latter; moneys which she did not owe, and which are, in truth, her property in the United States treasury. The particulars of the matter are given in Exhibit B."

In support of this claim Alabama alleges, (in her printed argument, p. 14,) that in 1836 the United States became possessed of the bonds of Alabama to the amount of one million six hundred and ninety-seven thousand dollars, carrying interest, which interest Alabama has been required to pay, and has paid semi-annually, to the United States "from their issue to this day" of filing her petition; that the United States should, in 1836, have applied the \$103,991 20, then due to Alabama, towards the payment of those bonds, and thus, at and from that time, reduced the amount on which interest was payable to the United States by Alabama. And Alabama on these allegations claims, in effect, that an account be now stated between the parties, as if the said sum of \$103,991 20 had been so applied to the bonds of Alabama by the United States in 1836, and that the over payments of interest by Alabama be repaid to her, with interest on each over payment from its date; making, as set forth in said Exhibit B, a total of \$125,361 60.

The allegation in the petition, that this "*secondary*" claim is an "*entirely distinct claim*" from the prior claim of interest on the \$103,991 20, is material, and it is not admitted. It is evident that this "*secondary*" claim could not have arisen if the United States had paid the sum of \$103,991 20 in 1836; and that it would have been satisfied if the United States had paid interest on that sum in February, 1850. The claim therefore is, in effect, in the position of the parties a claim for interest on the \$103,991 20, and is thus a paraphrase only of the claim for interest, which has been overruled.

But the evidence obtained from the Treasury Department since the printed argument of Alabama was submitted shows that the United States did not become "possessed" of the bonds of Alabama. By that evidence (Exhibits 2 and 3) it appears that under the treaties of 1832 and 1834 with the Chickasaw Indians, certain lands belonging to those Indians were required to be surveyed and sold for their benefit; and the treaties and the laws carrying them into effect required "the Secretary of the Treasury and the Secretary of War, respectively, to invest the proceeds of such sales belonging to the Indians under those treaties in stocks and securities bearing interest "*in trust for those tribes; such interest being paid to them through those departments.*" And the bonds of Alabama in question were acquired by such investments.

Upon these facts the United States had no title, legal or equitable,

in such bonds. After such investments were made the legal title in them was in the persons ex-officio holding them in trust, and the equitable title and beneficial interest were in the Indians as *cestuis que trust*. The claims therefore, on the bonds, and for the \$103,991 20, were not mutual debts, nor between the same parties, so that set-off or deduction was out of the question. The tenure and uses of the bonds were declared and fixed by law, and they could not be otherwise held or used.

But if the facts were as the petitioner alleges, and the United States, in 1836, had held the bonds, and in their own right, and at the same time owed Alabama the \$103,991 20, still the United States were under no legal obligation to apply the debt she owed to the bonds she held. If the United States had a right so to do, she had also the right to pay the money to the State of Alabama and thereby legally and absolutely discharge that debt forever. And if Alabama demanded and accepted the payment of the \$103,991 20, she was thereafter precluded from objecting that the sum was not applied to her bonds by the United States. The evidence shows that Alabama, with a full knowledge of all the facts she shows here, demanded and received of the United States the debt of \$103,991 20 on the 16th of February, 1850, six years before she filed her petition in this Court. There is no power in any court of law or equity to revive that debt, to annul the fact of a legal payment, or prevent or alter its legal consequences.

Upon the whole case we are of opinion that the petition establishes no claim against the United States.

NANCY M. JOHNSON, ADMINISTRATRIX OF WALTER R. JOHNSON, AND EMILIE G. JONES, EXECUTRIX OF THOMAS P. JONES, DECEASED.

[To accompany Bills H. R. C. C. 89 and 90.]

DECEMBER 7, 1858.

JANUARY 21, 1859.—Ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

NANCY M. JOHNSON, ADMINISTRATRIX OF WALTER R. JOHNSON, AND EMILIE G. JONES, EXECUTRIX OF THOMAS P. JONES, DECEASED, *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. Letters testamentary of the claimants, transmitted to the House of Representatives.
3. Evidence in the case, transmitted to the House of Representatives.
4. Opinion of the Court.
5. Bills in favor of each of the claimants.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said Court, at Washington, this seventh day of December, A. D. 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims:

The petition of Nancy M. Johnson, widow of Walter R. Johnson, deceased, and Emilie G. Jones, executrix and sole devisee of Thomas P. Jones, deceased, respectfully sheweth unto your honors: That the

said Thomas P. Jones and Walter R. Johnson were, together with Charles Reeder, appointed members of a "board of examiners to make experimental trials of inventions and plans to prevent the explosion of steam boilers;" that they were appointed by the Secretary of the Navy in April, 1843, and on the 14th day of that month entered upon the duties assigned to them thereby; that in the prosecution of those duties they continued until the 30th day of March, 1844; that in the letter appointing them they were informed by the Secretary of the Navy that their compensation would be three hundred dollars per month, and that amount was paid to them until the month of August, 1843, when they were informed that the appropriation devoted to such experimental trials was exhausted, and that there was, consequently, no fund out of which they could be paid.

And your petitioners further represent that, deeming the experiments about which they were engaged to be of very great importance, and feeling that if at that time they ceased their labors the time and money already spent by them would be lost to the government, they, with the advice of the Secretary, continued their experiments until completed, on the 30th day of March, 1844; and on the 17th of June of that year, before the close of the session in which the act required that it should be presented, they presented a report to Congress of the experiments made and the results obtained by them.

And your petitioners further show unto your honors that, on the 18th of May, 1844, the House of Representatives passed a resolution requesting the Secretary of the Navy to assign reasons why the board of examiners, &c., had not presented their report, as had been promised should be done during that session; that the Secretary of the Navy, on the 22d of May, 1844, communicated to Congress that the commissioners had been urged, since the commencement of the session, to present their report, &c.; that he believed they had used all diligence in bringing their examinations to a close, &c.; that thus, by both the House of Representatives and the Secretary of the Navy, were the board of examiners recognized after the date when the appropriation was exhausted, as was reported to them; and that, after this date, that is to say, after the 17th of June, 1844, when the examiners made their report to Congress, that report was accepted by Congress, printed, and distributed, as your petitioners have every reason to believe, widely through the country.

And your petitioner, Nancy M. Johnson, respectfully represents that she is the administratrix of the said Walter R. Johnson, and as such possessed of the rights of the said Walter R. Johnson, deceased, and the proper person to represent his said claim in this honorable Court; and your petitioner, the said Emilie G. Jones, respectfully represents that she is the executrix and sole devisee of the said Thomas P. Jones, deceased, and as such entitled to represent his claim aforesaid before your honorable Court.

And your petitioners further represent that this claim was presented to Congress during the twenty-ninth Congress, as your petitioners believe, for the first time, and that it has been before every Congress since; that it has been reported upon by committees of the said Con-

gresses frequently, and generally favorably; that it has passed one or the other branch of Congress, but never both during the same session; and that the matter is still before the Senate of the United States, in whose archives your petitioners' papers are all filed, and cannot be placed before your honors until an order to that effect can be obtained.

And your petitioners further show unto your honors that the said Walter R. Johnson and Thomas P. Jones were entitled to pay, at the rate of three hundred dollars per month, for the whole time that they served the government under the appointment hereinbefore mentioned, and for whatever other expenses they incurred by reason of, and in the performance of their duties under, said appointment; and to enable them, as the representatives of said parties, to obtain this their right, they pray the assistance of this honorable Court, and so, as in duty bound, they will ever pray, &c.

N. M. JOHNSON.

DISTRICT OF COLUMBIA, }
County of Washington, } ss.

Before the subscriber, a notary public in and for the county aforesaid, in the District of Columbia, personally appeared Nancy M. Johnson, and made oath that the facts stated in the foregoing petition are true to the best of her knowledge and belief.

N. M. JOHNSON.

Sworn to and subscribed before me, this 1st day of August, 1855.
JOHN F. WEBB, *Notary Public*.

The memorial in this case was presented to Congress at the first session of the 29th Congress, and was referred to the Committee of Ways and Means.—(See Journal, page 276, January 20, 1846.) An amendment was offered to the deficiency bill at that session, providing for the payment of the claim, but was rejected.—(Journal, page 610.)

At the same session, May 7, 1846, (Journal, page 766,) the memorial was referred to the Committee on Naval Affairs and subsequently withdrawn, August 10, 1846.—(Journal, page 1299.)

The same session: Memorial referred in the Senate to Committee on Claims, May 11, 1846, (Senate Journal, page 279,) and withdrawn, August 8, 1846.—(Senate Journal, page 508.)

The separate petition of Walter R. Johnson was presented at the same session to the House, and was referred to the Committee on Naval Affairs, March 10, 1846.—(See Journal, page 511.)

30th Congress, first session: The claim was reported favorably upon by the Committee on Naval Affairs, with a bill, which was amended and passed on the 8th of April, 1848.—(See House Journal, page 665.) No action in the Senate.

31st Congress: The claim was referred to the Committee on Claims in the Senate, (see Senate Journal, page 36,) and was reported favorably upon, (see Journal, page 76,) was considered, recommitted to

the committee, reported again with an amendment and passed.— (See pages 602, 604, and 619.) In the House, September 10, 1850, and September 14, 1850, (see Journal, 1438,) the Senate bill was read a second and third time, committed to the Committee of the Whole House, made the order for the next day and nothing was done.

32d Congress: The claim was at the first session referred to the Committee on Claims in the Senate, (see Journal, page 191,) and subsequently, upon leave, withdrawn; nothing was done during the Congress.

33d Congress, first session: The documents were referred to the Committee on Naval Affairs in the Senate and nothing done.—(See Journal, page 57.) At the second session, on the 14th February, 1855, the committee were discharged from further consideration of the claim.

PHILADELPHIA CITY AND COUNTY, ss:

I, Thomas C. Bunting, register for the probate of wills and granting letters of administration in and for the city and county [L. s.] of Philadelphia, in the commonwealth of Pennsylvania, do hereby certify and make known that, on the fourth day of June, in the year of our Lord one thousand eight hundred and fifty-two, letters testamentary on the estate of Walter R. Johnson, deceased, were granted unto Nancy M. Johnson, she having first affirmed well and truly to administer the same.

Given under my hand and seal of office, this ninth day of October, in the year of our Lord one thousand eight hundred and fifty-two.

THOS. C. BUNTING, *Register*.

UNITED STATES OF AMERICA,

Washington County, District of Columbia, to wit:

To all to whom these presents shall come, greeting:

Know ye, that, on the seventeenth day of March, in the year of our Lord one thousand eight hundred and forty-eight, letters testamentary of all and singular the goods, chattels, and credits which were of Thomas P. Jones, late of Washington county, deceased, was, by the orphans' court of Washington county aforesaid, granted and committed unto Emilie G. Jones, of the county and district aforesaid, she having first entered into bond, with approved securities, for the faithful performance of the duties thereof.

Witness William F. Purcell, esq., judge of the orphans' court of Washington county, District of Columbia, this 11th day of [L. s.] February, anno Domini 1857.

Test:

ED. N. ROACH, *Register of Wills*.

NAVY DEPARTMENT, *February 5, 1857.*

SIR: With this you will find the certified copies of papers asked for in your letter of the 3d instant, with the exception of the letter of acceptance of the appointment of Thomas P. Jones, of the 10th of April, 1843, as a member "of a board of examiners to make experimental trials of inventions and plans to prevent the explosion of steam boilers," which does not appear on the files of the department.

Very respectfully, your obedient servant,

J. C. DOBBIN.

W. B. WEBB, Esq., *Attorney for the Executors of
Dr. Jones and W. R. Johnson, deceased, Washington, D. C.*

UNITED STATES NAVY DEPARTMENT,
February 13, 1857.

I hereby certify that the annexed are true copies from the records of this department.

CHAS. W. WELSH,
Chief Clerk.

Be it known that Charles W. Welsh, whose name is signed to the above certificate, is now, and was at the time of so signing, chief clerk in the Navy Department, and that full faith and credit are due to all his official attestations as such.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this thirteenth day [L. s.] of February in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States the eighty-first.

J. C. DOBBIN,
Secretary of the Navy.

NAVY DEPARTMENT,
April 28, 1845.

SIR: Your letter of the 14th instant, requesting a settlement of Mr. Charles Reeder's account, for his services as a member of the board for testing inventions to prevent the explosion of steam boilers, was duly received.

On the 31st of January last, in answer to yours of the 24th of that month, enclosing a copy of Mr. Reeder's account, amounting to \$3,185 25, you were informed that the claims of the commissioners had "already been submitted to the chairman of the Committee of Ways and Means in the House of Representatives."

Under the 5th section of the act of March 3, 1843, by virtue of which Mr. Reeder claimed compensation, the report of the board was to have been "laid before Congress at its next session," that is, during the 1st session of the 28th Congress, 1843-'44. The report not having been completed before the appropriation was exhausted is the reason why the accounts were transmitted by the department to Congress at the request of Professor Johnson.

In a communication of Professor Johnson to the Hon William Parmenter, chairman of the Committee on Naval Affairs of the House of Representatives, a copy of which is now on the files of this office, dated January 11, 1845, he states: "At the expiration of four months, when the experiments on explosions were yet in progress and several forms of apparatus not yet tried, the board were informed that the appropriation was exhausted." In the same communication Professor Johnson adds:

"The members (of the board) have recently stated their claims. It remains to be seen whether Congress will recognize them."

Were the appropriations for "contingent not enumerated" adequate to pay this account, to pay one account of *three* claimed would, under the circumstances, seem to be interfering with the legitimate action of Congress, which I must decline doing in this as in every case where the letter of the law has not been complied with.

Mr. Reeder will therefore look to Congress for such remuneration as they may think proper to allow.

I am, respectfully, your obedient servant,

GEORGE BANCROFT.

A. THOMAS SMITH, Esq.,
Washington, D. C.

NAVY DEPARTMENT, *January 17, 1846.*

SIR: Your letter of the 12th instant, directing my attention to a prior communication of the department addressed to A. Thomas Smith, esq., has been duly received.

It appears from the records of the department that the report of the board to which you refer was transmitted to the Senate near the close of the 1st session of the 28th Congress.

The claims of Mr. Reeder, Professor Johnson, and yourself having been referred to Congress, because the department had no funds applicable to their payment, I can see no substantial reason for changing the decision which was communicated in the letter to Mr. Smith.

I am, respectfully, yours,

GEORGE BANCROFT.

Dr. THOMAS P. JONES,
Washington, D. C.

UNITED STATES NAVY DEPARTMENT, *February 5, 1857.*

I hereby certify that the annexed, numbered 1, 2 and 3, are true copies of letters from the records and files of this department.

CHARLES W. WELSH, *Chief Clerk.*

Be it known that Charles W. Welsh, whose name is signed to the above certificate, is now, and was at the time of so signing, chief clerk in the Navy Department, and that full faith and credit are due to all his official attestations as such.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this fifth day of February, [L. s.] in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States the eighty-first.

J. C. DOBBIN, *Secretary of the Navy.*

No. 1.

NAVY DEPARTMENT, *March 20, 1843.*

SIR: I invite your attention to the fifth section of the act of Congress, No. 43, approved March 3, 1843, to modify the act entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," approved July 7, 1838.

I am desirous of appointing you as one of the three commissioners authorized, and propose a compensation of \$300 per month.

If agreeable to you to accept the duty I will thank you to signify the same to me, and to suggest a plan by which the law may be executed.

The balance in the treasury applicable to this object is about \$4,000.

I am, respectfully, &c.

A. P. UPSHER.

Dr. THOMAS P. JONES,
Washington, D. C.

No. 2.

WASHINGTON, *March 22, 1843.*

SIR: I have the honor to acknowledge the receipt of your letter of the 20th instant, expressing a wish to appoint me one of the commissioners under the provisions of the 5th section of the act of Congress "to modify the act entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam.'"

It will afford me great pleasure to aid in the performance of the duties of such an appointment, as I believe that I may be enabled thereby to render available the information that I have acquired on a subject to which I have paid considerable attention.

When the appointments are made, I will embrace the earliest opportunity, in concurrence with the gentlemen with whom I may be associated, to suggest a plan by which the law may be most advantageously executed.

I am, sir, very respectfully, your obedient servant,

THOS. P. JONES.

Hon. A. P. UPSHER,

Secretary of the Navy.

No. 3.

NAVY DEPARTMENT, *April* 10, 1843.

SIR: You are hereby appointed a member of the board of examiners to make experimental trials of inventions and plans to prevent the explosion of steam boilers.

Your compensation will be at the rate of three hundred dollars per month, to commence from the date of your acceptance of this appointment.

You are requested to meet the other two examiners, Professor W. R. Johnson and Mr. C. Reeder, at the navy yard, Washington, on Friday, the 14th instant, at noon.

I am, respectfully, your obedient servant,

A. P. UPSHER.

T. P. JONES, M. D., *Washington.*

UNITED STATES NAVY DEPARTMENT, *February* 5, 1857.

I hereby certify that the annexed, numbered 1, 2, 3, and 4, are true copies of letters from the records and files of this department.

C. W. WELSH, *Chief clerk.*

Be it known that Charles W. Welsh, whose name is signed to the above certificate, is now, and was at the time of so signing, chief clerk in the Navy Department, and that full faith and credit are due to all his official attestations as such.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this fifth day of Feb-
[L. S.] ruary, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States the eighty-first.

J. C. DOBBIN,

Secretary of the Navy.

No. 1.

NAVY DEPARTMENT, *March 20, 1843.*

SIR: I invite your attention to the 5th section of the act of Congress, No. 43, approved March 3, 1843, to modify the act entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," approved July 7, 1838.

I am desirous of appointing you as one of the three commissioners authorized, and propose a compensation of \$300 a month to each. If agreeable to you to accept the duty, I will thank you to signify the same to me, and to suggest a plan by which the law may be executed.

The balance in the treasury applicable to this object is about \$4,000.

I am, respectfully, &c.,

A. P. UPSHUR.

Professor WM. B. JOHNSON,
Philadelphia.

No. 2.

PHILADELPHIA, *March 22, 1843.*

SIR: I have the honor to acknowledge the receipt of your communication of the 20th instant, inviting my attention to the 5th section of an act recently passed in relation to steamboats, &c., &c., signifying a desire to appoint me one of the commissioners under that act. In reply I will state that I will accept with pleasure the duty which you propose, and on the terms mentioned. I have procured a copy of the law in question, and will, as early as practicable, submit my views in relation to a plan on which the law may be executed. Ever since leaving Washington last autumn I have been intently engaged on the analytical experiments on coal, the trials of copper, and the preparation of apparatus and tests, and have only to-day so far completed them as to enable me to go on with the trials at the navy yard. I shall probably reach Washington in a day or two after the receipt of this, and will lose no time in paying my respects to you at the department.

I have the honor to be, &c., &c.,

WALTER R. JOHNSON.

Hon. A. P. UPSHUR,
Secretary of the Navy.

No. 3.

NAVY DEPARTMENT, *April 10, 1843.*

SIR: You are hereby appointed a member of the board of examiners to make experimental trials of inventions and plans to prevent the explosion of steam boilers.

Your compensation will be at the rate of three hundred dollars per month, to commence from the date of your acceptance of this appointment.

You are requested to meet the other two examiners, Dr. T. P. Jones and Mr. C. Reeder, at the navy yard, Washington, on Friday, the 14th instant, at noon.

I am, respectfully, your obedient servant,

A. P. UPSHUR.

Professor W. R. JOHNSON,
Of Philadelphia.

No. 4.

NAVY YARD, *Washington, April 14, 1843.*

SIR: Your letter of appointment to me as one of the examiners to make experiments on inventions and plans to prevent the explosion of steam boilers did not reach me until this morning, owing to its having been deposited in the city post office instead of being forwarded to this place. This may account for any seeming delay on my part in answering the same.

I have now to signify my acceptance of the said appointment, and to state that I shall be ready to meet the other commissioners this day at noon.

I remain, very respectfully, your obedient servant,

WALTER R. JOHNSON.

Hon. A. P. UPSHUR,
Secretary of the Navy.

NAVY DEPARTMENT,
December 24, 1857.

SIR: I have received your letter of the 21st instant, in which you inquire "whether any notice in writing was given" to Professors Johnson and Jones, "or either of them, about the month of August, 1843, that the appropriation for their payment was exhausted," &c.

No letter or written notice, such as you refer to, appears to have been addressed by the department in August, 1843, to either of the persons named; but letters, dated respectively November 13, 1844, and January 27, 1845, were addressed by Mr. Secretary Mason to Professor Johnson, explaining the reason why the professor's account or claim for compensation had not been adjusted. Copies of these letters are herewith enclosed.

I am, respectfully, your obedient servant,

ISAAC TOUCEY.

JOHN D. MCPHERSON, Esq.,
Deputy Solicitor Court of Claims, Washington, D. C.

NAVY DEPARTMENT,
November 13, 1844.

SIR: I have received your letter of the 9th instant, asking payment of the account, which was approved in July last, for services and expenses during your researches on coal.

The department has no funds at command, under the head of "Experiments," but your claim will be included in the estimate.

I am, very respectfully, yours,

J. Y. MASON.

Professor W. R. JOHNSON, *Philadelphia.*

NAVY DEPARTMENT,
January 27, 1845.

SIR: Your communication of the 14th instant is received, with a copy of your letter to the Hon. William Parmenter, chairman of the Committee on Naval Affairs, House of Representatives. In your letter to Mr. Parmenter you say: "I confess I know not what experiments have been made in addition to the above to absorb this sum. Others may possibly understand the matter more fully, and why my outstanding claim on the subject of coal is not discharged."

In your connexions with the department, your duties have been confined to particular objects, and not to keeping the account of the expenditures. It is not, therefore, to be wondered at, that you do not know what experiments have been authorized to absorb the sum appropriated for the purpose of experiments. There were many others; and while it is hardly possible to trace the exact amount expended, and the objects, from the fact that the expenditures were charged to the head of "Increase, Repairs," &c., yet I am satisfied that the sum appropriated has not only been expended, but exceeded; and this is the reason why your account for experiments on coal has not been paid, as you have been informed. Your claim for compensation for services, with Messrs. Jones and Reeder, has been made known to me more recently, and has not been paid for the same reason.

A statement of the moneys paid to you by the navy agent at Washington has been furnished to the chairman of the Committee of Ways and Means, at his request; but it is not possible, without a careful examination of every voucher, to determine which of these payments were for your own services, and which for the labor of others, or for materials. For the reasons already stated, this would be attended with great difficulty. I supposed that you could more readily explain it, and therefore I make you this communication. You will remember that I mentioned the subject to you when you were last at the department.

I am, respectfully, yours,

J. Y. MASON.

Professor WALTER R. JOHNSON, *Philadelphia.*

TREASURY DEPARTMENT,
Fourth Auditor's Office, February 19, 1857.

SIR: A request made by the Court of Claims to the department, to furnish a certified copy of the account of all the expenditures of the "board of examiners to make experimental trials of inventions and plans to prevent the explosion of steam boilers," appointed by the Secretary of the Navy, under an act of Congress of March 3, 1843, together with any other information in the department tending to elucidate a claim of Nancy M. Johnson and others before said Court, having been referred to this office, I have the honor to state that the said board never rendered to this office any account of its expenditures, but that some vouchers for articles purchased by said board, approved by the Secretary of the Navy, and paid by the navy agent in this city, have been found among the settled accounts of the said agent, and an abstract of them is herewith transmitted. These are all the vouchers that have been discovered which indicate upon their face that they were for expenditures by the said board. There is no other information in this office, that I am aware of, which would elucidate the said claim, except, perhaps, the vouchers for payments made to the members of the said board for their services, of which also I have included in the abstract I transmit.

The papers referred to me are herewith returned.

I have the honor to be, sir, very respectfully, your obedient servant,
 A. O. DAYTON.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

Abstract of vouchers in the office of the Fourth Auditor of the Treasury for expenditures made by the "board of examiners to make experimental trials of inventions and plans to prevent the explosion of steam boilers," appointed by the Secretary of the Navy, under an act of Congress of March 3, 1843, and of all the vouchers on file in said office for payments made to the members of the said board for their services.

1843.

April 10—John Holton, for copper.....	\$15 96	
May 1—Campbell & Coyle, for iron plates.....	5 66	
May 24—A. & C. Reeder, for steam boiler.....	409 90	
	————	\$431 52
June 14—W. R. Johnson, for services April 14 to June 14, 1843.....	600 00	
June 23—Chas. Reeder, for services two months..	600 00	
July 15—T. P. Jones, for services April 14, to July 14, 1843.....	900 00	
July 14—W. R. Johnson, for services June 15 to July 14, 1843.....	300 00	

1843.

Aug. 31—T. P. Jones, for services July 14 to Aug.	
14, 1843	\$300 00
Aug. 15—W. R. Johnson, for services July 14 to	
Aug. 14, 1843	300 00
Oct. 18—C. Reeder, for services two months	600 00
	—————\$3,600 00
	4,031 52

A. O. DAYTON.

TREASURY DEPARTMENT,

Fourth Auditor's Office, February 19, 1857.

IN THE COURT OF CLAIMS.

WALTER R. JOHNSON'S ADMINISTRATRIX AND THOMAS P. JONES'
EXECUTRIX *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

By the second section of the joint resolution approved August 31, A. D. 1842, it was provided "that the Secretary of the Navy be, and he is hereby, authorized to make such experimental trial of the several inventions of Thomas M. Easton, Ethan Campbell, Aaron Quinby, or either of them, or of other persons, to prevent the explosion of steam boilers, as may be necessary to test their value and utility as applicable for the purposes aforesaid, to the steamships of the United States; and the sum of six thousand dollars is hereby appropriated therefor out of the fund" appropriated by the act of the eleventh of September, eighteen hundred and forty-one, for experiments connected with the naval service of the United States.—(5 Stat. at L., page 585, No. 12.)

By the fifth section of the act of Congress approved March 3, A. D. 1843, chapter 94, it is provided "that in execution of the authority vested in him by the second section of the joint resolution 'authorizing experiments to be made for the purpose of testing Samuel Colt's submarine battery, and for other purposes,' approved August thirty-first, one thousand eight hundred and forty-two, the Secretary of the Navy shall appoint a board of examiners, consisting of three persons of thorough knowledge as to the structure and use of the steam engine, whose duty it shall be to make experimental trial of such inventions and plans designed to prevent the explosion of steam boilers and collapsing of flues as they may deem worthy of examination, and report the result of their experiments, with an expression of their opinion as to the relative merits and efficacy of such inventions and plans, which report the Secretary shall cause to be laid before Congress at its next session. It shall also be the duty of said examiners to examine and report the relative strength of copper

and iron boilers of equal thickness, and what amount of steam to the square inch each, when sound, is capable of working with safety; and whether hydrostatic pressure, or what other plan, is best for testing the strength of boilers under the inspection laws; and what limitations as to the force or pressure of steam to the square inch, in proportion to the ascertained capacity of a boiler to resist, it would be proper to establish by law for the more certain prevention of explosions."—(5 Stat. at L., page 627.)

On the 10th day of April, A. D. 1843, Walter R. Johnson and Thomas P. Jones, respectively, were appointed, by the Secretary of the Navy, members of the board of examiners authorized by the last recited act, and on the 14th day of April, A. D. 1843, they, severally, accepted their appointments and entered upon the discharge of their duties. The compensation of each of them was fixed by the Secretary of the Navy at the rate of three hundred dollars per month, to commence from the date of their respective appointments.

The petitioners allege that the above named Thomas P. Jones and Walter R. Johnson continued in the prosecution of their duties until the 30th day of March, A. D. 1844. It does not expressly appear from the evidence how long they were employed; but, in obedience to a resolution of the House of Representatives, passed on the 18th of May, A. D. 1844, the Secretary of the Navy, on the 22d of May, A. D. 1844, reported to Congress that the examiners had been urged, since the commencement of that session of Congress, to present their report, and that he believed that they had used all diligence to bring their examinations to a close. The report was made to Congress on the 17th day of June, A. D. 1844. By that report it appears that on the 6th day of January, A. D. 1844, they were still engaged in their work. Now, it is self-evident, we think, "that a minute and careful computation, and a strict comparison of all the results," was "indispensable to give value to researches such as were consigned to" these examiners. It is also indubitable that, after the conclusion of their experiments, they must have been engaged a considerable time, "either in making out descriptions, procuring the necessary drawings, or making the calculations and tabular statements of their various observations." Their report, which was the last duty required of them, was not ready on the 22d day of May, A. D. 1844. From these facts we think it a just and reasonable conclusion that the decedents, Johnson and Jones, were engaged for the full period which has been alleged. They were, therefore, employed from the 14th day of April, A. D. 1843, till the 30th of March, A. D. 1844, a period of eleven and a half months.

The examiners received compensation for their services up to the 14th day of August, A. D. 1843, and the appropriation made by the joint resolution of the 31st of August, A. D. 1842, being then exhausted, no further compensation was afterwards made to them.

The petitioners claim that their decedents respectively were entitled to compensation for the whole time they were engaged in and about the objects contemplated by the act of March 3, A. D. 1843. But it has been urged that the power of the Secretary of the Navy

to employ them was merely commensurate with the appropriation made by the joint resolution of August 31, A. D. 1842, and that their right to compensation and authority to proceed with their work ceased as soon as the appropriation was exhausted.

By the sixth section of the act of Congress approved May 1, A. D. 1820, it is provided as follows: "No contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment."—(3 Stat. at L., page 568.)

The examiners were either officers or employés. If they were officers, then this is not a case of contract, and consequently the act of 1820 has no application to it. Their office, too, being created for a special purpose, would continue until that purpose was accomplished. Moreover, as their salaries were not prescribed by the statute, they were of necessity left to the sound discretion of the appointing officer, the Secretary of the Navy, and would continue during the continuance of the examiners in office. The last duty required of them by the act of 1843 was to make report to the Secretary of the Navy. This duty was performed on the 17th day of June, A. D. 1844. If, therefore, the examiners were officers, they continued in office and were entitled to their salaries till the day last mentioned. But we do not adopt this view, nor do the petitioners claim for their decedents the compensation to which they would be entitled under it.

We are of the opinion that the examiners were employés and not officers. Under the act of 1843 the Secretary of the Navy was required to "*appoint a board of examiners.*" The word "appoint" in that act is used in the sense of *employ*, and means merely *to procure by contract or to contract with*. Hence it is obvious that there was a contract between the United States and the examiners, and that it was made by the Secretary of the Navy "under a law authorizing the same." It was therefore valid under the act of 1820. It is not pretended that the compensation agreed upon between the parties was unreasonable, or that the examiners, Johnson and Jones, did not do the work prescribed by the act of 1843 and required of them by the contract. Our opinion is that, upon performing the duty required of them, they become entitled to full compensation therefor, notwithstanding it might exceed the appropriation which had been made.

We shall therefore report a bill in favor of each of the petitioners for the sum of *two thousand two hundred and fifty dollars*.

ISAAC BOWMAN AND ANOTHER, EXECUTORS OF ISAAC
BOWMAN.

DECEMBER 7, 1858.—Reported from the Court of Claims and committed to a Committee of
Whole House to-morrow.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United
States in Congress assembled:*

The Court of Claims respectfully presents the following documents
as the report in the case of

ISAAC BOWMAN AND ANOTHER, EXECUTORS OF ISAAC
BOWMAN, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certified copies of documents from the Pension office, filed by claimant.
3. Isaac Bowman's will, with certificate of probate of the same, and certificate of the death of Mrs. Bowman, transmitted to the House of Representatives.
4. Copy of Heath's report in the case of John Crittenden. Copy of instructions to General Clark in same case, and the decision of the Secretary of the Interior, transmitted to the House of Representatives.
5. Decision of the Secretary of the Interior in Isaac Bowman's case.
6. Claimant's brief.
7. United States Solicitor's brief.
8. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed
[L. s.] the seal of said Court, at Washington, this seventh day
December, A. D. 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

*To the Judges of the Court of Claims, established by the act of the Con-
gress of the United States of America approved February 24, 1855:*

Your petitioners, Isaac S. Bowman and George Brinker, surviving
executors of the last will and testament of the deceased Isaac Bow

man, citizens of the State of Virginia, and therein residing, do most respectfully state and allege to this honorable Court:

That the said testator, Isaac Bowman, a citizen of the State of Virginia, in the war of the revolution held the commission of the State of Virginia, in the regiment of Colonel George Rogers Clark, (afterwards Brigadier General Clark,) called the Illinois regiment, and also held the staff appointment in said regiment of quartermaster, also called in the vulgar tongue horse-master, because among his duties of quartermaster he had to purchase horses for the regiment, sell such as were broken down and unfit for or not longer needed for service, and to superintend that branch of the service.

That whilst in service and in the line of his duty, commanding a detachment of said regiment, they, the said troops, were attacked by the Chickasaw Indians, the allies of Great Britain, then at war with the United States, whereupon a bloody battle ensued, in which said Isaac Bowman was wounded and disabled by four wounds in his body and limbs, by leaden balls discharged from the guns of the Indians, and taken prisoner; all his soldiers except one, named Riddle, were killed, and said Isaac Bowman was detained as a prisoner from November, 1779, to April, 1780; he was sold by his captors to a white man trading among the Indians, named Trumbull, by him taken to New Orleans, and from thence to the Island of Cuba, from whence said Isaac Bowman passed to the city of Philadelphia, and thence to his home in Virginia.

Your petitioners aver that said Isaac Bowman never resigned his commission as lieutenant, nor his appointment as quartermaster, otherwise called horse-master; that he was never again ordered into service after his return from captivity; that he never was cashiered or dismissed from the service by the sentence of any court martial. That, by reason of the said facts and services of said Isaac Bowman, he became entitled, under the statute of Virginia, (10 Henning, p. 25,) to half-pay for life as a lieutenant and quartermaster, otherwise called horse-master.

The law of Virginia adopted for the pay of her State troops the regulations and pay adopted by the Congress for the continental army.—(See 9 Henning's Stat. at Large, pp. 194, 389, and the Journals of Congress of 27th May, 1778; 2 vols. by Way & Gideon, p. 567.) The pay of a lieutenant of infantry was fixed at twenty-six and two-thirds dollars per month; and by the resolve of Congress, (same page, 567, vol. 2,) the pay of a quartermaster was fixed at thirteen dollars per month (\$13) in addition to his pay in the line; but it appears that the commissioners of the State of Virginia for adjusting the accounts for full pay allowed said Bowman, as horse-master or quartermaster, at the rate of six shillings and four per day, (six shillings to the dollar being the currency of Virginia.) The pay as lieutenant at the rate of twenty-six dollars and two-thirds per month, and as horse-master or quartermaster at the rate of thirteen dollars per month, in addition to his pay in the line, made said Bowman's pay at the rate of thirty-nine and two-thirds dollars per month; the one-half of which (equal to nineteen dollars $\frac{83}{100}$ and a fraction) the said Bowman became

entitled to per month, from 22d April, 1783, when the war ended, (in Virginia,) until his death in the month of in the year 1826. And by the act of Congress approved July 5, 1832, to provide for liquidating and paying certain claims of the State of Virginia, and especially by virtue of the third section of said act, (4 Stat. at Large, by Little and B., p. 563, ch. 173,) the United States assumed to pay those claims for half-pay of the officers of the regiments and corps enumerated in said act, which had not been paid or prosecuted to judgments against the State of Virginia, "and for which said State would be bound on the principles of the half-pay cases already decided in the Supreme Court of Appeals of said State."

Your petitioner further states, that under said act of Congress, he, as the executor of his father, did ask payment of the half-pay due for his testator's services as lieutenant and quartermaster, otherwise called horse-master, in the regiment of Colonel Clark, employed in the Illinois service as aforesaid, and produced to the Commissioner of Pensions, James E. Heath, to whom the administration of the said act of 5th July, 1832, had been committed, evidence of the services of said Isaac Bowman, deceased, as before stated; but the said Heath rejected the claim. Upon appeal to the Secretary of the Interior, (Hon. R. McClelland,) the rejection of the claim was approved.

After this, your petitioner, by his agent, presented his petition to the Senate and House of Representatives of the Congress of the United States, which petition was referred in the Senate to the Committee on Pensions, who on 13th February, 1854, made their report in favor of the claim No. 101, and in the House to the Committee on Revolutionary claims, who on the 16th February, 1854, made their report, No. 106, in favor of the claim, by Mr. Rogers; and upon a recommitment to the same committee, a second report in favor of said claim was made on the 30th June, 1854, No. 275, by Mr. Eddy; which reports, respectively, were concurred in by the respective Houses, and by the separate resolves of the Senate and of the House of Representatives the said claim for half-pay, under the act of the general assembly of Virginia, of May session, 1779, was referred to the Secretary of the Interior for liquidation, under the act of Congress of July 5, 1832. All which will more fully appear by said reports, No. 106, No. 275, and No. 101, and the resolutions of said two Houses respectively, as printed in the journals and public documents of the said two Houses of Congress, to which your petitioner begs leave to refer; and he avers that the said reports contain a true history of the services, wounds, captivity, and sufferings of the said Isaac Bowman, deceased.

Certified copies of these reports and resolutions were produced to the Secretary of the Interior. Whereupon the said Secretary, instead of liquidating the said claim and causing the same to be paid, referred to the Attorney General of the United States the question, whether the said two separate reports and resolves made thereupon by the Senate and by the House of Representatives, respectively, were legally obligatory upon him, the said Secretary. Whereupon the Attorney General advised that nothing but a bill, or a joint resolution passed by the two Houses of Congress, and approved by the Presi-

dent of the United States, or, if disapproved by him, reconsidered and passed by two-thirds of each House, his objections notwithstanding, could make an obligatory rule of action; but that the said resolves of the two Houses, although separately made and never presented to the President of the United States for his signature, were entitled to great respect, and gave sufficient cause for opening the decision and giving the claim a reconsideration. But the Secretary of the Interior has, nevertheless, persisted in his refusal to liquidate the claim and to cause payment thereof at the Treasury of the United States, although the evidence produced to him from the records of the State of Virginia, as well as by the proof of witnesses, was ample and conclusive to establish the right and justice of said claim for half-pay, according to the laws of the State of Virginia, and the act of Congress of July 5, 1832, before mentioned. In verification whereof, your petitioner begs leave to refer to said evidence produced to the Secretary of the Interior, certified from that department to the Congress of the United States, and also to the evidence on which the Congress acted as aforesaid, and now remaining as well on the files of the Department of the Interior as on the files of the Clerk of the House of Representatives.

Your petitioner will, in due time, bring here into court his letters testamentary, which show plainly that he is executor of the last will and testament of said Isaac Bowman, deceased, who died on the 9th day of September, 1826.

Your petitioner prays that the solicitor for the United States appointed to represent the government before this honorable Court be required to answer to this petition; that such proceedings be had herein as justice and equity require; and that, on the final hearing, this Court will grant him such relief as his case deserves.

W. AMBROSE WHARTON, and
GEO. M. BIBB, *For Petitioner.*

DISTRICT OF COLUMBIA, CITY OF WASHINGTON, *scd.*

AUGUST 9, 1855.

On this day, before me, the undersigned, one of the justices of the peace of the United States of America, in and for the said city, duly commissioned, sworn, and acting as such, appeared William A. Wharton, who then and there made oath that the statements in the foregoing petition of Isaac S. Bowman *vs.* the United States, which relate to the matters of fact therein alleged, are true, to the best of his knowledge and belief.

Sworn to before me, on the day and year, and at the place stated in the caption.

JOHN S. HOLLINGSHEAD,
Justice of the Peace.

UNITED STATES COURT OF CLAIMS.

Amendment to Petition.

ISAAC S. BOWMAN and GEORGE BRINKER, surviving executors of ISAAC BOWMAN, deceased, *vs.* THE UNITED STATES.

The petitioners moved to amend their petition in this: Instead of the prayer for the specific aggregated sum stated in the petition, the petitioners pray for the half-pay due to said Isaac Bowman, deceased, as lieutenant and quartermaster, otherwise called horse-master, in Clark's regiment, with interest on each annuity from the day it became due until paid; or for such other sum or sums as this Court shall adjudge right and proper.

BIBB,
For Petitioners.

I hereby certify that the accompanying pages, numbered from one to twenty-five, inclusive, are truly copied from the originals on file in the office of the Commissioner of Pensions.

J. MINOT,
Commissioner of Pensions.

Be it remembered that J. Minot, who has signed the foregoing certificate, is Commissioner of Pensions; and that to his attestations full faith and credit are and ought to be given.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the department to be affixed, on this twenty [L. s.] tieth day of December in the year of our Lord one thousand eight hundred and fifty-five.

R. McCLELLAND,
Secretary of the Interior.

Transcript of the testimony in the case of the application of the representatives of Isaac Bowman for half-pay as lieutenant in the Illinois regiment, in the Virginia service, under the act of July 5, 1832.

PROCEEDINGS OF THE ILLINOIS BOARD IN 1784.

1.—*Evidence to sustain the claim.*

Proceedings of the adjusting board for the Illinois officers and soldiers, in 1784.

Copy of the proceedings of the commissioners for adjusting the

claims of the officers and soldiers of the Illinois regiment to the lands given them, under a resolution of January 2, 1781, agreeably to the act of assembly passed October session, 1783.

Louisville, August 2, 1784.—Court met according to adjournment. Present: Walker Daniel, George R. Clark, John Montgomery, John Bailey, Robert Todd, and William Clarke, gent., commissioners.

Ordered that the board adjourn till to-morrow morning.

W. DANIEL, *Clerk.*

August 3.—The board met according to adjournment. Present the same members as yesterday, and also A. C. Chaplin, gent.

On motion, the board came to the following resolution: That all officers and soldiers who marched and continued in service until the reduction of the British posts on the northwest side of the Ohio, that all who engaged and enlisted in the Illinois regiment afterwards and served during the war, or three years, are entitled to a share of the grant under the resolutions and act of assembly; that all those soldiers who have enlisted in said regiment since the 2d day of January, for three years, or during the war, are not entitled, as there seems to be no provision under the resolution for those who should thereafter be incorporated in the said regiment.

That the officers of the regiment are entitled to a share of the land in proportion to the commission they respectively held on the said 2d day of January, 1781, and not in proportion to the commission they have since held in consequence of promotions, and that therefore officers commissioned since that period are not entitled at all. And that those soldiers who enlisted to serve twelve months after their arrival at Kaskaskias, agreeable to an act of assembly of the fall session, 1778, for the protection and defence of the Illinois country, who did not re-enlist in the regiment, are not included in said resolution. That those officers who were commissioned under said act and resigned before the expiration of the twelve months are not entitled. Last, that those who continued during the year and then retired, not having a command, are entitled. Adjourned.

August 4.—The same members as yesterday.

The following claims were allowed and disallowed, as they are marked, to wit:

John Williams, Captain George R. Clarke, Brigadier General George Walls, Captain John H. Montgomery, Lieutenant Colonel Robert Todd, Captain Joseph Bowman, Major Leonard Helms, Captain Thomas Quick, Major Isaac Taylor, same, Walker Daniel, Major Jesse Evans, *not allowed.*

Captain James Shelby, Captain John Bailey, Captain Richard Bashears, Captain Robert George, Captain Richard McCarty, Captain Abraham Kellar, Captain Edward Worthington, Captain William Harrod, Captain John Rogers, Lieutenant James Merriwether, Lieutenant James Montgomery, Lieutenant Isaac Bowman.

(Here follow the names of 180 others, subalterns, non-commissioned officers, and privates.)

The record then proceeds as follows:

The commissioners direct certificates to issue in the following mode, to wit:

To a brigadier general 7,500 acres of land; to a lieutenant colonel 4,500 acres of land; to a major 4,000 acres of land; to a captain 2,000 acres of land; to a subaltern 2,000 acres of land; to a sergeant 200 acres of land; and to a private 100 acres of land. On a calculation is supposed to leave 19,500 acres of land to be granted to further claimants, &c.

The remainder of the proceedings of the board, being confined entirely to the adoption of provisions and rules for the distribution of the lands, is omitted here.

A.

Certificate of John Douthitt.

Certificate of John Douthitt in relation to the foregoing record:

I, John Douthitt, clerk of the board of commissioners of the Illinois grant, do hereby certify that it appears from the books and papers in this office that Isaac Bowman served in said Illinois regiment as a lieutenant, and that he was allowed two thousand one hundred and fifty-six acres of land in said Illinois grant, to wit: lots 1, 158, 213, and 289—five hundred acres each—and 156 acres in No. 32.

In witness whereof, I have hereunto set my hand and seal this 29th day of August, 1834.

JOHN DOUTHITT. [L. s.]

B.

Affidavit of Kercheval.

STATE OF VIRGINIA, *Shenandoah county*, ss:

Personally appeared before me, the subscriber, a justice of the peace in and for said county, Samuel Kercheval, who, being duly sworn, saith that he is now in the sixty-eighth year of his age; that he became personally acquainted with Captain Isaac Bowman, late of said county, deceased, about the year 1784, and afterward related by marriage, and continued most intimately acquainted with him until the time of his death, on the 6th of September, 1826, when he (deponent) was personally present; that he was ever known through life as an officer of the Illinois regiment in the war of the revolution; that the deceased repeatedly and at various times minutely stated to him (deponent) a part of his services and privations, to wit: that late in

the fall of the year 1779, while coming from Kaskaskia (as he, deponent, understood on furlough,) to the Falls of Ohio, they were attacked by the Indians, when all, save and except himself, were killed or ————afterwards heard from. And the said Bowman—wounded in four places, the scars of which he, deponent, has often seen, to wit: one below the shoulder blade, another through the left arm, another through the calf of the leg, and a fourth through the foot—was taken prisoner and carried into the interior of the Indian country, and ultimately adopted by an Indian squaw, and was afterwards purchased by an Indian trader and taken to Natchez, and from thence he went to New Orleans, the Havana, on the island of Cuba, from which he succeeded in obtaining a passage to Philadelphia, and from thence he reached his home, the place on which he lived and died; that he was long a cripple, so unable to have joined his regiment and perform military duty probably not for a year or two; that the said Captain Bowman stated to him that he had lost his commission and all of his papers at the time he was taken prisoner.

SAMUEL KERCHEVAL.

Sworn to and subscribed before me this 8th day of August, 1834.

W. MORRIS.

C.

Affidavit of D. Stickley.

STATE OF VIRGINIA, *Shenandoah county*, ss:

Personally appeared before me, the subscriber, a justice of the peace in and for said county, Captain David Stickley, who, being sworn according to law, saith that he has been personally and intimately acquainted for about forty years with Captain Isaac Bowman, late of the said county, deceased; that the said deceased has during that period of time ever been known and reported to have been an officer of the Illinois regiment of the war of the revolution, and to have been wounded and taken prisoner by the Indians and kept in captivity for some time; and deponent has repeatedly and often heard the history of the same from Captain Bowman himself, to wit: ascending the Ohio river, where he was attacked by the Indians, when all or nearly so were killed, and himself wounded in several places and taken prisoner, and retained for some time in captivity, when he was purchased by an Indian trader and taken to Natchez, and thence he went to New Orleans and the island of Cuba, and at the Havana he obtained a passage for Philadelphia, and thence home to his residence, adjoining him, (the said deponent,) where he believes (the said deponent) he was born and died on or about the 9th day of September, 1824. From the common report relative to Captain Bowman, and his known character for truth and veracity, and Captain Bowman's frequent recurrence to these transactions, he (the

said deponent) is as fully convinced of the reality of his service and captivity, &c., as he could possibly be of anything which he did not see, and further he saith not.

D. STICKLEY.

Sworn and subscribed before me this 8th of August, 1834.

W. MORRIS.

I do certify that I have been acquainted with Mr. Kercheval and Captain David Stickley for years, and know them to be men of truth, and the above was truly read to them before testified to.

W. MORRIS.

AUGUST 8, 1834

D.

Affidavit of Abraham Bowman.

COMMONWEALTH OF KENTUCKY, } ss.
Fayette county,

Personally appeared before me, Daniel Bradford, a justice of the peace in and for the county aforesaid, Colonel Abraham Bowman, a revolutionary officer, who, being first duly sworn, saith that his brother, Isaac Bowman, a lieutenant in the Illinois regiment of the Virginia State line of the army of the revolution, was taken prisoner, as he has been informed by his said brother, and believes, on the Ohio river, about forty miles above the mouth, in the month of November, 1779, being then, at the time of his capture, a lieutenant of said regiment, being then in service from the spring of the year 1777; that he was with the Indians as a prisoner until the month of April, 1780, and was then purchased by a man by the name of Trumbull, when he went to New Orleans, thence to Cuba, and thence to Philadelphia, which this deponent thinks was in the fall of 1781; and further this deponent saith not.

ABRAHAM BOWMAN.

Subscribed and sworn to before me, a justice of the peace for the county aforesaid, this 23d day of June, 1832.

DANIEL BRADFORD, *J. P.*

E.

Affidavit of Anthony Crockett.

STATE OF KENTUCKY, } ss.
Franklin county,

Personally appeared before me, the subscriber, a justice of the peace in and for said county, Anthony Crockett, of the army of the revolution, who, being duly sworn, saith that Isaac Bowman was a

lieutenant in the Illinois regiment in the fall of the year 1779 at *Vincennes*; that he, affiant, at that time was returning into Virginia, and knows not how long the said Bowman continued in service, and further saith not.

Sworn to and subscribed this 4th day of September, 1832.

JOHN McKEE, *J. P. F. C.*

The foregoing are true copies of original papers on file in this department.

J. B. RICHARDSON,
Assistant Secretary of Commonwealth.

G.

Affidavit of Archibald Lovelace.

DISTRICT OF COLUMBIA, *Washington county, ss:*

Archibald Lovelace, an old, respectable, and competent witness, appeared before me, the undersigned, a justice of the peace for said county and District, and made oath that he was acquainted with Daniel Ovear, of Fauquier county, Virginia, who was a soldier in the Illinois regiment in the war of the revolution; that said Ovear was a connexion of his first wife; that he lived near him many years; heard said Ovear say, when speaking of his revolutionary services, that he, said Ovear, was a part of the time under Lieutenant Isaac Bowman, of the Illinois regiment; said that Bowman was a valuable officer; that while he, Bowman, was first lieutenant in said regiment, that he was taken prisoner on or near the Ohio river, and was kept as such a considerable time. The statement of Ovear, he says, made a considerable impression on his (affiant's) mind, when speaking of an officer being taken prisoner, and his privations.

He, Ovear, further said that Lieutenant Bowman lived and died in Shenandoah county, leaving a highly honorable and intelligent family. He, affiant, says that Ovear made the above statement in substance more than once; and he, Ovear, was a man of strict integrity, and is now dead, as he is informed.

Given under my hand and seal this 12th day of April, 1852.

F. S. MYER,
Justice of the Peace.

F.

Affidavit of James Guthrie.

I know Colonel Anthony Crockett, of Franklin county, Kentucky, and he was all that the Hon. George M. Bibb has said in his letter of him.

I only know Colonel Bowman by character, which was unquestionably good.

JAMES GUTHRIE.

H.

Application for full pay.

TESTIMONY FROM THE FIRST AUDITOR'S OFFICE, RICHMOND.

Proceedings before the commissioners in obtaining balance of full pay.

MAY 12, 1779.

THE STATE OF VIRGINIA TO ISAAC BOWMAN,

Dr.

To my services as horse-master in the Illinois regiment until I was defeated by the Indians, which was the 17th day of November, and then until October 11, 1780, before I got home, which is 16 months and 29 days.

JUNE 24, 1783.

I certify that Mr. Isaac Bowman was appointed horse-master, in the year 1779, in the Illinois department; but how long he continued I know not.

G. R. CLARK.

CITY OF RICHMOND, *to wit*:

This is to certify that Isaac Bowman made oath before me this day, that he hath never received from the State of Virginia any satisfaction or pay as horse-master to the Illinois regiment, during his continuance therein.

Given under my hand this 24th day of June, 1783.

W. FOUSHEE.

The commissioners are all of opinion that Mr. Isaac Bowman ought to be allowed for his services as horse-master from the 12th of May, until the 17th of November, 200 days, at 6s. 4d. per day, amounting to £63 6s. 8d—equal to a quartermaster's pay.

They are further of opinion that he was out of the service of this State at the time he was captured, and consequently has no claim for the time he remained in captivity, but beg leave to refer it to the consideration of the honorable the executive.

FORT CLARK, *June 27, 1779.*

I have received of Isaac Bowman the sum of eighteen dollars, for taking up and securing three horses belonging to the State of Virginia.

JOHN BATTIST ^{his} MONTRAY.
mark.

Test:

JOHN HASKINS.

Allowed by the Illinois scale, 13s.

FORT CLARK, *June 20, 1779.*

Then received of Isaac Bowman, horse-master, the sum of twelve dollars for four men taking care of the State horses, six days, I say received by me.

JOSEPH ^{his} ~~X~~ BEAUGROFF.
mark.

Allowed by the Illinois scale, 9s.

COMMISSIONERS' OFFICE,
Richmond, June 25, 1783.

It appears to the commissioners that there is due to Mr. Isaac Bowman for service as horse-master, &c., the sum of sixty-four pounds, nine shillings and two pence, per vouchers received. Given by order of the board.

JOHN McDOWELL, *Secretary.*

WEDNESDAY, *June 25, 1780.*

Mr. Isaac Bowman presented an account of his service as horse-master to the Illinois regiment from May 12, till November 17, 1779, 200 days, for which the commissioners are of opinion he ought to be allowed equal to quartermaster's pay, six shillings four pence per day, which amounts to sixty-three pounds six shillings and eight pence. They are further of opinion that he was out of the service of the State at the time he was captured, and consequently has no legal claim for the time he was in captivity, but beg leave to refer it to the honorable the executive.

It also appears to the commissioners that one pound two shillings six pence is due to the said Isaac Bowman for cash paid in behalf of the State, when he was in service as per vouchers.

WEDNESDAY, *April 20, 1785.*

Illinois, to J. A., treasurer,

DR.

Warrant to Isaac Bowman for his services as horse-master, &c., in the Illinois regiment, per certificate from the commissioners appointed to settle western claims; sixty-four pounds nine shillings two pence. Evidence showing that John Reed was quartermaster from June 1, 1779, to October 11, 1779.

This is to certify that there is on file in this office, in the 2d volume of Illinois papers, an account headed thus:

"An account of quartermaster's stores, &c., issued in the Illinois and its dependencies, commencing the first day of June, 1779, by John Reed, quartermaster of the Illinois regiment, viz: * * * which is very lengthy, the first entry therein dated June 1, 1779, and the last on the 11th of October, 1779, and is dated Falls of the Ohio, October, 31, 1779, and signed, John Reed, quartermaster Illinois regiment, and verified by G. R. Clark, November 4, 1779.

Given under my hand, in the office of the auditor of public accounts, Richmond, Virginia, this 15th March, 1853.

RO. JOHNSON,
Auditor of Public Accounts.

K.

This is to certify that the upper corners of the greater part of the book filed in this office, endorsed "plunder store accounts," "Mr. Isaac Bowman, quartermaster accounts," has been so nearly obliterated by the action of water and some other cause as to be illegible; when legible it is invariably headed 1779, and there can be little doubt that it was so throughout, as the Fort St. Vincent had not been captured in the spring and summer of 1778, and Isaac Bowman states that he was defeated by the Indians in November, 1779, and did not reach home until October 1780; that the said book contains accounts raised against thirty-seven persons, many of which contained charges similar to those embraced in the certified extracts from that book, viz: the accounts of Captain Edward Worthington, Major Joseph Bowman, and Isaac Bowman, given from this office a short time since. And that so far as it has been practicable to search the mass of papers connected with this Illinois expedition, no evidence of a resignation by Isaac Bowman has been discovered.

Given under my hand at the auditor's office, Richmond, this 14th February, 1853.

RO. JOHNSTON,
Auditor Public Accounts.

I.

Letter from John Todd, showing the capture of Bowman.

MAY IT PLEASE YOUR EXCELLENCY: On consulting with Colonel Clark we found it impracticable to maintain so many petty posts on the Illinois with so few men. I concluded it better to draw them all to one point. The land at the junction of the Ohio and Mississippi was judged best situated for the purpose, as it would command the trade of an extensive country on both sides of each river, and might serve as a check to any encroachments from our present allies, the Spaniards, whose growing powers might justly put us upon our guard, and whose fondness for engrossing territory might otherwise urge them higher up the river upon our side than we could wish. The expenses in erecting this new post and victualling the men would have been obstacles insurmountable without a settlement contiguous to the garrison to support it, whose adventurers would assist the soldiers in the heavy work of building their fortification. I therefore granted to a certain number of families four hundred acres to each family, at a price to be settled by the general assembly, with commissions for civil and military officers and the necessary instructions, copies of the principle of which I herewith send you. The others being agreeable to the printed forms heretofore delivered to me by the governor and council. Lest the withdrawing our troops from St. Vincent might raise suspicions among the citizens to our disadvantage, I have sent to Major Bossoran, the then district commandant, blank

commissions with power to raise one company ; put them in possession of the garrison with the assurance that pay and rations should be allowed them by the government.

I enclose you also a return of the clothes, &c., which I sent down by Mr. Clarke to Captain Dodge, whom I appointed agent agreeably to your excellency's letter, as Mr. Lindsey desired to be discontinued. When Colonel Clark left the falls his officers and men, to the amount perhaps of 120, were well clothed, except in the article of linens.

Mr. Lindsey had not arrived the 8th May last from Illinois, and I have not heard whether the goods from Orleans were yet arrived.

Captain Dodge was also to receive them from Lindsey.

Mr. Isaac Bowman, with seven or eight men and one family, set off from Kaskaskias the 15th November last, in a bateau, attended with another bateau and twelve men and three or four families in it, bound for the falls of the Ohio. I judged it safer to send to the falls many articles belonging to the commonwealth by Bowman than to bring them myself by land.

Bowman's batteau fell into the hands of the Chickasaw Indians, and the other arrived in March or April at the French Lick in Cumberland, with the account that Bowman and all the men except one, Riddle, were killed and taken. I enclose your excellency with a list of such articles as belonged to the State, as well as I can make out from my detached memoranda; my books and many necessary papers being also lost.

Many necessary articles of intelligence yet remain uncommunicated. I will enjoy no leisure until I shall have fully acquainted your excellency with the situation of Illinois.

I have the honor to be, with great respect, your excellency's most obedient and humble servant,

JNO. TODD, JR.

		<i>Isaac Bowman.</i>	Dr.
			£. s. d.
May	21	To 8 yards ducking, at 9 shillings.....	3 12 00
		To 4 two-and-a-half point blankets, at 15 shillings	3 00 00
		To 1 dozen of knives, at 1 shilling.....	0 12 00
		To 1 carret of tobacco, at 5 shillings	0 5 00
		To 3 pounds strouding, at 18 shillings per ell	2 14 00
		To 4 shirts, at 12 shillings per shirt	2 8 00
		To 2 two-point blankets, at 9 shillings.....	0 18 00

I hereby certify that there is on file in this office a small book of 64 pages, of which the last 13 pages are blank. On the first page of which is written—

Plunder Store acc't. Mr. Isaac Bowman, Qr. Mr. acc'ts.
--

And the foregoing copies are extracted from pages 6, 32, 33, 34, and 35, of that book.

Given under my hand at the Auditor's office, Richmond, this 9th February, 1853.

RO. JOHNSON, *Aud. of Public Accounts.*

Major Joseph Bowman.

Dr.

		£.	s.	d.
21	To 6½ yards ducking, at 9 shillings per yard.....	2	18	6
	To 2½ yards strouding, at 14s. 6d. per yard	1	15	3
	To 4 two half-point blankets, at 15 shillings.....	3	00	00
	To 3 dozen knives, at 1 shilling	1	16	00
	To 4 shirts, at 12 shillings each.....	2	8	00
	To 12 two-point blankets, at 9 shillings.....	5	8	00
	To 1 piece blue coating, at £12.....	12	00	00
	To 1 waistcoat, at 5 dollars	1	10	00
	To 1 pair trowsers, at 5 dollars	1	10	00
	To 6 shirts, at 12 shillings per shirt	3	12	00
	To 1½ ells strouding, at 18 shilling per ell	1	11	6
	To 4 hand towels, at 3 shillings.....	0	12	00

Capt. Edward Worthington.

Dr.

		£.	s.	d.
19	To 1 suit of clothes, at 20 dollars	6	00	00
	To 1 pair of shoes, at 3 dollars	0	18	00
	To 2 blankets, at 15 shillings per blanket.....	1	10	00
	To 3½ yards of strouding, at 14s 6d per yard	2	10	9
	To 2 coats, at 10 dollars each.....	6	00	00
	The above delivered by Mr. Kennedy.			
July 12	To 21 two half-point blankets, at 15 shillings per blanket	15	15	00
	To 21 shirts, at 12 shillings per shirt	12	12	00
	To 48 scalping knives, at 1 shilling per knife	2	8	00
	To 21 ells strouding, at 18 shillings per ell	18	18	00
	To 28 carrets tobacco, at 5 shillings per carret.....	7	00	00
	To 3¼ yards ducking, at 9 shillings per yard	1	13	9
March 19	To 1 suit clothes to Edward Murry, at 20 dollars	6	00	00
	To 1 pair shoes, at 3 dollars.....	0	18	00
		82	3	6
August 12	To 1 two-point blanket, at 9 shillings.....	00	9	00

Return, June 2, 1780, Richmond, by George Rogers Clark, commander-in-chief of the Virginia forces in the western department, &c., &c.

Whereas a fort is intended immediately to be built near the mouth of the Ohio, and a number of artificers wanting to carry on the works, all well as other inhabitants—

I do, by virtue of the power and authority to me given, authorize you to raise any number of persons that you can get to become settlers at said post, the whole to be under pay as militia as long as necessary. You are to rendezvous at this place by the 1st day of December next.

Given under my hand, headquarters, Falls of Ohio, September 30, 1779.

Captain SILAS HARLIN, *Commanding Militia.*

A provision return of the troops at Fort Clark, under the command of Colonel George Roger Clark, commencing the 10th and ending the 12th day, both days included, 1799.

ISAAC BOWMAN AND ANOTHER.

RANK.	FIELD OFFICERS.		COMMISSIONED OFFICERS.			STAFF OFFICERS.			NON-COMMISSIONED OFFICERS.		DRUMMERS AND FIFERS.		RANK AND FILE.							Number of rations.
	Colonel.	Major.	Captain.	Lieutenant.	Ensign.	Commissary general.	Surgeon.	Issuing commissary.	Sergeant major.	Quartermaster sergeant.	Sergeants.	Drummers.	Fifers.	Gunners.	Artificers.	Carpenters.	Wash-women.	Not fit for duty.	Total.	
Company.																				
Captain George.....	1	1	2	---	1	1	1	1	---	1	1	1	---	1	---	1	2	14	18	34
Captain Williams.....	---	1	---	1	---	---	---	---	---	---	1	1	1	---	---	1	1	9	11	48
Captain McCarty.....	---	---	2	---	---	---	---	---	---	---	2	1	1	4	---	1	2	20	27	99
Captain Keller.....	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	4	4	12
Captain Worthington.....	---	1	---	---	---	---	---	---	1	---	1	---	---	---	1	4	1	7	13	48
Total	---	3	4	1	1	1	1	1	1	1	5	3	2	5	1	7	6	54	73	292

JAMES ROBERTSON, Quartermaster.
G. R. CLARK.

Account of the public stores purchased and delivered to the western and Illinois department, under direction of William Shannon, Quartermaster General, &c.

Date.	Of whom purchased.	No. of horses	Date.	How disposed of, &c.	No. of horses.
1799. May 12	J. B. Lacinier	36	1799. June 3	Delivered to Colonel Todd	1
June 9	Godfrey Landell	6	14	Delivered to Captain Bowman, H. M., as per his receipt.	38
Nov. 21	John Hagen	1	July 6	Lost on the way from Fort Clarke to St. Vincent	1
			Nov. 4	Lost on Benson's creek, between the falls of the Ohio and Harrisburg, on my way to government	1
			Dec. 12	Died in Chunk river on my way to government	1
			1780. March 15	Sold the horse purchased of Hagen, and credited on account to State	1
	Total	43		Total	43
				(Errors excepted.)	

WILLIAM SHANNON, Quartermaster General.

FALLS OF THE OHIO, May 1, 1780.

FORT PATRICK HENRY,
July 10, 1779.

SIR: Please to deliver to *Isaac Bowman* all the goods remaining in the plunder taken at the post, with an inventory of the same; and your compliance will oblige your humble servant,

JOSEPH BOWMAN.

The QUARTERMASTER.

(Here follows the inventory of sundry stores delivered to Isaac Bowman.)

AUDITOR'S OFFICE.

I hereby certify the copies on the foregoing six pages to be truly copied from the first and second returns of Illinois papers on file in this office.

Given under my hand this 15th March, 1853.

RO. JOHNSON,
Auditor of Public Accounts.

Isaac Bowman's will.

In the name of God, Amen. I, Isaac Bowman, of the county of Shenandoah and State of Virginia, do make and ordain this instrument of writing to be my last will and testament:

1. It is my will and desire that, after my death, my body shall be decently buried by my executors, hereinafter named, and my funeral expenses and all my just debts fully paid and satisfied.

2. I have heretofore given to my eldest son, Philip, a valuable tract of land in the county of Shenandoah, which I conveyed by deed to him, as his full portion of real estate. I have also given and conveyed to my sons, Abraham, Joseph, and John, valuable tracts of land in the State of Indiana as their respective portions of my real estate. I have also heretofore given to my said several sons, Philip, Abraham, Joseph, and John, sundry slaves and other articles of personal property, with which they respectively stand charged as their respective proportions of my slaves and personal estate, agreeable to my plan of the present division of my slaves and personal estate.

3. I give and devise to my daughter Susannah, wife of William H. Richardson, now resident in the State of Ohio, a tract of land containing five hundred acres, more or less, being lot No. 232, lying and being in what is generally called the "Illinois military grant," in the State of Indiana, to his and her heirs or assigns, as her full *portition* of my real estate. I have also heretofore given to my said daughter Susannah sundry slaves and other articles of personal estate, with which she stands charged as her proportion of the present division of my personal estate.

4. I give and devise to my daughter Eliza B., wife of Joseph M. Fauntleroy, of the county of Frederick, a tract of land containing five hundred acres, more or less, in the said Illinois grant, and State of Indiana, as her full proportion of my real estate. I moreover give

and devise to my said daughter Eliza B. the several slaves and other articles of personal property with which she stands charged, as her proportion of the present division of my personal estate ; all which I give and devise to her and her heirs or assigns forever.

5. I give and devise to my beloved wife Mary the whole of the several tracts of land on which I now reside, part whereof lies in the county of Shenandoah, and the remainder in Frederick, including the tract I lately purchased, formerly owned by my son Philip, and on which he now resides, with the buildings and improvements thereon, and all the residue of my slaves and personal estate, subject, nevertheless, to the conditions and provisions hereinafter expressed and limited.

6. It is my will and desire that, as my six younger children, to wit, Isaac, George, Robert, Washington, Mary, and Rebecca, respectively, arrive at lawful age, my executors shall deliver to each of them as many of my slaves, in equitable lots, as can conveniently be made, which lots are to be taken from the families of the slaves and their increase, of which I acquired possession by my intermarriage with my said wife Mary, and as much of my stock of horses and other articles of personal property as will make each one's proportion as nearly equal as can conveniently be done to the distributions which I have heretofore made among my elder children by my said wife Mary, and each division, when so made, shall be delivered to my said six younger children, and each one of them shall be charged with his or her respective parts so delivered, and when so delivered shall constitute their respective portions of my personal estate, except such further provisions for them as hereafter expressed.

7. It is my will and desire that my widow shall maintain and educate my said six younger children without any charge to either of them for their expenses of maintenance and education; and I enjoin it as a solemn duty upon my said wife Mary, and my nephew and friend, George Brinker, to be particularly attentive to the decent maintenance of said six younger children, and their education, until they respectively arrive at lawful age. But if either of said six younger children should depart this life before he, she, or they shall arrive at lawful age, or without lawful issue of their bodies, in that event it is my will and desire that the proportion of the slaves to which he, she, or they would have been entitled shall be equally divided among the surviving children of my said wife Mary, and their heirs or assigns.

8. For the purpose of better enabling my executors to maintain and educate my said six younger children, it is my will and desire that my estate shall be kept together, and that the same shall be managed and conducted as if I was still living, until my youngest or surviving youngest child shall arrive at lawful age, except the event hereinafter mentioned shall have taken place, and except such specific provisions hereinbefore and hereinafter expressed. I therefore expressly direct that no appraisement of my personal estate or slaves shall be made, nor no security required of my executors, until my youngest or surviving youngest child shall arrive at lawful age, unless my widow should marry; in that event, an appraisement and division

of my slaves and personal estate shall immediately be made among all my surviving children, according to the provisions hereinbefore expressed, and their heirs or assigns. As soon as my youngest or surviving youngest child shall arrive at lawful age, a general division and distribution of my slaves, with future increase, and personal estate, shall be made amongst all my children and their heirs, subject, nevertheless, to the further provisions hereinafter made to my said wife Mary.

And whereas I have heretofore given and divided between the children of my first wife the slaves and their increase, of whom I acquired possession by my intermarriage with my said first wife; and it being equally just and reasonable that the children of my present wife Mary shall exclusively own the slaves and their increase, of whom I acquired possession by her, it is therefore my will and desire that slaves and their increase acquired by said wife Mary shall be exclusively divided among her several children and their heirs or assigns, according to the provisions hereinbefore expressed. And the slaves and their increase owned by me previous to my first marriage, or acquired by purchase at any time, shall be equally divided among all my children and their heirs, except as hereinafter excepted, which general division shall be made at the time hereinbefore directed.

9. My several lots of land in the town of Jeffersonville, in the State of Indiana, my ferry across the Ohio river, and my tract of land in the said Illinois grant, containing one hundred and fifty-six acres, more or less, being part of lot No. 32, in said grant, shall constitute one other division of real estate; my tract of land lying on the waters of Green river and Delaware creek, in the State of Kentucky, containing fourteen hundred acres, more or less, shall constitute one other division of my real estate; and my several tracts of land whereon I now live and occupy, part whereof lies in the county of Shenandoah, and the remainder in Frederick, shall constitute four other divisions of my real estate, which four divisions shall be made in the following manner: The said several tracts contain altogether about eleven hundred acres, which shall be divided into four equal parts, according to quantity and quality, and as nearly of a size as can justly be done. My brick dwelling house, with lands and improvements immediately adjacent thereto, shall constitute one division; my stone house, in which I formerly lived, with the lands and improvements thereto, shall constitute the second division; my merchant mill, and the lands and improvements adjacent thereto, shall constitute the third division; and my tract, commonly called the Island tract, shall constitute the fourth division. The said several four divisions to be so laid off and divided as to give each legatee as nearly an equal quantity of land as can be done, having due regard to quality and timber. And as there are no buildings on the Island tract, I will and direct that the three legatees who shall receive the three improved divisions shall each one pay to the one receiving the Island tract a sufficient sum to defray the expenses of erecting comfortable and convenient buildings thereon, which sum or sums of money so to be paid by each legatee as aforesaid to the one receiv-

ing the Island, shall be adjudged and awarded by the commissioners who shall be appointed by the court of Shenandoah county for dividing and laying off the same.

If any two of my sons, when they arrive at lawful age, shall think proper to accept of the lands in the State of Indiana, including my ferry across the Ohio river, at Jeffersonville, and the lots in the town of Jeffersonville, with the 156-acre tract, and the 1400-acre tract, on the waters of Green river, in the State of Kentucky, as their full portions of my real estate, or if any one of them shall accept the 1400-acre tract, on Green river, as aforesaid, then I give and devise the same to him and his heirs or assigns forever; and if any one of them shall accept the lots in Jeffersonville, the ferry, and 156-acre tract in Indiana, then I give and devise the same to him and his heirs or assigns forever. But if neither of my said younger sons shall accept of either of the divisions of real property in the western country, then it is my will and desire that the same, together with the four divisions of the lands in the counties of Shenandoah and Frederick, shall be divided by lot between my said six children, Isaac, George, Robert, Washington, Mary, and Rebecca, and their heirs or assigns forever; and if any one of my sons shall accept of either of the divisions of my western lands, then the remainder of all my lands to be divided by lot between the other five as before directed.

10. I hereby request the county court of Shenandoah to appoint as many discreet and disinterested men as to them shall seem reasonable and proper for dividing and allotting the lands aforesaid, agreeable to the foregoing provisions, and for awarding and deciding the amount to be paid in money to the one which will receive the Island tract; and the division, allotment, and award of such commissioners, so appointed by the court, shall be final, which divisions and allotments, with the award of the said commissioners, I give and devise to my said six children, Isaac, George, Robert, Washington, Mary, and Rebecca, and their heirs or assigns forever. But if either of my said six younger children shall depart this life before he, she, or they shall arrive at lawful age, then, in that event, it is my will and desire that the part of my real estate to which he, she, or they would have been entitled shall be sold by my executors, and the money arising from the sale thereof to be equally divided between all my surviving children and their heirs or assigns.

11. I give and devise to my said wife Mary one-third of my lands in the counties of Shenandoah and Frederick for and during her natural life, including my brick dwelling house and all the buildings and improvements attached thereto; her choice of five slaves, which choice is to be taken from the families of those slaves I acquired by her, also to be held during her natural life, and after her death the said slaves and their increase to be equally divided between her children and their heirs or assigns. I also give and devise to my said wife Mary her choice of three head of horses, six milch cows, two feather beds, bedsteads, and furniture, my riding gig and harness, and one-third part of all the residue of my personal estate (the slaves excepted) to her exclusive use and benefit and to her heirs or assigns.

But if any part of the same shall remain at the time of her death, the same shall be sold by my surviving executors, and the money arising therefrom equally divided between all my children and their heirs or assigns.

12. If the moneys due me at the time of my death shall be insufficient to discharge my just debts, my executors are hereby authorized and required to sell as much of my personal estate, the slaves excepted, as will be sufficient to discharge all my just debts, and to sell and dispose of all surplus crops and stock of all kinds from time to time for the more convenient and comfortable maintenance of the family and education of the children.

13. When my youngest child or surviving youngest child shall arrive at lawful age, or at the marriage of my widow, should that event take place, an appraisement of all my slaves and personal estate shall be made, and the same divided between my children in the manner before directed; and for the more convenient distribution thereof, all my personal estate, the slaves excepted, shall be sold by my executors, except such part as I have hereinbefore especially bequeathed.

14. The slaves and other personal estate to which my son Philip would have been entitled, I give and bequeath to his several children, as well those now in existence as those which may hereafter be born, to be delivered and paid to them as they respectively arrive at lawful age, or when the general division of my estate shall take place, and not before.

And lastly, I do hereby appoint my said wife Mary, my nephew and friend, George Brinker, my four sons, Isaac, George, Robert, and Washington, executors of this my last will and testament; any one or more of my said sons to be permitted to qualify as they arrive at lawful age.

In testimony whereof, I have signed, sealed, published, pronounced, and declared this instrument of writing to be my last will and testament, hereby revoking all other wills by me heretofore made, this 20th day of June, in the year of our Lord 1824.

ISAAC BOWMAN. [L. s.]

Signed, sealed, published, and declared to be his last will and testament, in presence of—

SAML. KERCHEVAL.

RICHD. M. SYDNOR.

WILL. M. BAYLY.

Codicil.

Whereas I was appointed guardian for my four elder children, to wit, Philip, Abraham, Catharine, and Susannah, in order to receive their respective portions of the legacy due their mother, or to them in right of their mother, who was one of the daughters of Philip Gatewood, deceased; and as I have heretofore delivered and paid to each of said four elder children the slaves and all other property and

moneys due them in right of their said mother: I therefore expressly declare and direct that the said Philip, Abraham, Catharine, and Susannah, or all and every one claiming under or from them, shall release and discharge my executors from all claim or demand whatever for and on account of my guardianship aforesaid, before he, she, or they shall be entitled to receive or demand any part of their respective legacies provided and devised in my foregoing last will and testament.

ISAAC BOWMAN. [L. s.]

Teste:

SAML. KERCHEVAL.

RICHD. M. SYDNOR.

WILL. M. BAYLY.

At a court held for the county of Shenandoah, on Monday, the 13th day of November, 1826, this last will and testament of Isaac Bowman, deceased, with a codicil thereto annexed, was produced in the court and proved by the oaths of Samuel Kercheval and William M. Bayly, witnesses thereto, and ordered to be recorded; and on motion of Mary Bowman, George Brinker and Isaac S. Bowman, three of the executors therein named, who made oath according to law, and entered into bond, without security, agreeable to the directions of said will, a certificate is granted them for obtaining probat thereof in due form.

Teste:

P. WILLIAMS, C. S. C.

A copy—Teste:

P. WILLIAMS, C. S. C.

VIRGINIA, *Shenandoah County, to wit:*

I, Philip Williams, clerk of the said county court, do hereby certify that the foregoing is a true copy of the last will and testament of Isaac Bowman, deceased, recorded in the clerk's office of said county.

In testimony whereof, I hereunto set my hand and affix the seal of [L. s.] the said county, this 13th day of August, 1834, and in the 59th year of the Commonwealth.

P. WILLIAMS, C. S. C.

STATE OF VIRGINIA, *Shenandoah County, ss.*

“At a court held for the county of Shenandoah, on Monday, the 13th day of November, 1826, this last will and testament of Isaac Bowman, deceased, with a codicil thereto annexed, was produced into court, and proven by the oaths of Samuel Kercheval and William M. Bayly, witnesses thereto, and ordered to be recorded.

“And, on motion of Mary Bowman, George Brinker and Isaac S.

Bowman, three of the executors therein named, who made oath according to law, and entered into bond, without security, agreeable to the directions of said will, a certificate is granted them for obtaining probat thereof in due form."

I, Samuel C. Williams, clerk of the said county court, certify that the foregoing is a true copy from the minutes thereof.

In testimony whereof, I have hereunto set my hand and affixed the [L. s.] seal of said court this 3d day of January, 1856.

SAML. C. WILLIAMS,
Clerk of Shenandoah County.

Fee for copy, &c., and seal, \$1 42.

STATE OF VIRGINIA, *Frederick County, to wit:*

I, Joseph Kean, clerk of the circuit superior court of law and chancery for the said county of Frederick, in the State of Virginia, do hereby certify that it appears, from an order of said court bearing date the 22d day of December, 1831, that Mrs. Mary Bowman, the executrix and widow of Isaac Bowman, deceased, of Shenandoah county, was dead prior to the date of said order.

In testimony whereof, I hereto set my hand and annex the seal [L. s.] of the said court this 14th day of August, 1834.

J. KEAN.

A A.

Instructions to Colonel Clarke, January 2, 1778.

SIR: You are to proceed with all convenient speed to raise seven companies of soldiers, to consist of fifty men each, officered in the usual manner, and armed most properly for the enterprise, and, with this force, attack the British post at Kaskaskia. It is conjectured that there are many pieces of cannon and military stores to considerable amount at that place, the taking and preservation of which would be a valuable acquisition to the State. If you are so fortunate, therefore, as to succeed in your expedition, you will take every possible measure to secure the artillery and stores, and whatever may advantage the State.

For the transportation of the provisions, troops, &c., down the Ohio, you are to apply to the commanding officer at Fort Pitt for boats; and, during the whole transaction, you are to take special care to keep the true destination of your force secret. Its success depends upon this. Orders are therefore given to Captain Smith to secure the two men from Kaskaskia; similar conduct will be proper in similar cases. It is earnestly desired that you show humanity to such British subjects, and other persons, as fall into your hands. If the white inhabitants at that post and the neighborhood will give undoubted evidence of their attachment to this State, (for it is certain they live within its limits,) by taking the test prescribed by law, and by every other way

and means in their power, let them be treated as fellow-citizens, and their persons and their property duly secured; assistance and protection against all enemies whatsoever shall be afforded them, and the Commonwealth of Virginia is pledged to accomplish it. But if these people will not accede to these reasonable demands, they must feel the miseries of war under that humanity that has hitherto distinguished Americans, and which it is expected you will ever consider as the rule of your conduct, and from which you are in no instance to depart. The corps you are to command are to receive the pay and allowance of militia, and to act under the laws and regulations of this State now in force as militia. The inhabitants at this post will be informed by you that, in case they accede to the offers of becoming citizens of this State, a proper garrison will be maintained among them, and every attention bestowed to render their commerce beneficial, the fairest prospects being opened to the dominions of both France and Spain. It is in contemplation to establish a post near the mouth of the Ohio. Cannon will be wanted to fortify it; part of those of Kaskaskia will be easily brought thither, or otherwise secured, as circumstances will make necessary. You are to apply to General Hand for powder and lead necessary for this expedition. If he cannot supply it, the person who has that which Captain Lynn brought from Orleans can. Lead was sent to Hampshire, and that may be delivered you.

I am, &c.

A true copy.

A. BLAIR, C. C.

The above is truly copied from a paper in a volume marked "Virginia Claims," now in this office.

J. E. HEATH,
Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, March 27, 1854.

SIR: The claim of the legal representatives of Major John Crittenden, late of Kentucky, deceased, for half-pay under the act of Congress approved July 5, 1832, appears to have been first presented shortly after the passage of that act, and to have been rejected by Mr. Secretary McLean, of the Treasury Department, on the 20th of February, 1853. Within the last three or four years it seems to have been revived by the Hon. George M. Bibb, as attorney and administrator, and brought by appeal before my immediate predecessor, who again rejected it on the 4th of June, 1852; but upon the receipt from Mr. Bibb of an argument intended to show that Lieutenant John Crittenden, of the continental line, and the Brigade Major John Crittenden, who was attached to the Illinois regiment, were two distinct persons, your predecessor was requested to examine the claim on that

issue. This he appears to have done, but certain new evidence and arguments having been presented subsequent to his report of the result of that examination, dated the 27th of August, 1852, he was again requested to review the claim and submit a report thereof, which he did on the 4th of February, 1853.

Finding this amongst a large number of claims unacted on when I took charge of the department, it was returned with others to be first examined by you, and is now again before me on your report of the 18th instant.

This claim having been examined and rejected by Messrs. Secretaries McLean and Stuart, the only question which I can properly consider is that raised since Mr. Stuart's decision of the 4th of June, 1852, as to the identity of Lieutenant John Crittenden, of the continental line, with the Brigade Major John Crittenden, who was attached to the Illinois regiment; and upon that point I fully concur with yourself and Mr. Commissioner Heath in the opinion that the evidence is conclusive of their being one and the same person.

This being the case, and Lieutenant Crittenden having in his lifetime received his commutation of five years' full pay in lieu of half pay for life, no claim exists against the United States under the act of 5th July, 1832.

All the papers in the case, except the several reports from your office, are herewith returned.

I am, sir, very respectfully, &c.,

R. McCLELLAND,
Secretary.

Hon. S. P. WALDO,
Commissioner of Pensions.

PENSION OFFICE, *February 4, 1853.*

SIR: I have been prevented by a press of official engagements from an earlier consideration of the half-pay case of Brigade Major John Crittenden, returned by you to this office on the 8th of October last for re-examination and report, in view of the new evidence and argument filed by the attorney for the claimant. As the subject has been already fully discussed, it is unnecessary to do more than notice a few of the points presented by Mr. Bibb's last argument. Before doing so, however, it is proper to correct an error into which he has fallen. He asserts more than once that I have thought proper, of my own mere motion, to re-examine the case after his appeal had been presented. If he had taken pains to examine with care the papers filed he would have seen that this was done by the special direction of the Secretary. Mr. Bibb denies that the Illinois regiment proper was raised by the act of assembly passed at its October session, 1778.—(9th Henning, page 552.) In this he is mistaken. He confounds the volunteer force with which Clarke captured the British posts at Kaskaskia and Vincennes with the regiment subsequently raised and placed upon a legal footing by competent authority; an inspection of

paper marked A A will show this to be so. That paper is a copy of the instructions given Clarke by the executive of Virginia, authorizing him to raise a volunteer force and attack the British post of Kaskaskia. *It bears date the 2d of January, 1778.* Acting under these instructions, Colonel Clarke promptly raised a force, and in the spring of that year gallantly defeated the enemy in the manner so graphically described by Mr. Bibb. The victorious result of the expedition rendered it necessary that a permanent force should be organized for the protection of the country, and at its next session the legislature accordingly organized such a force; this was the Illinois regiment proper. It is true that many of the officers and men who accompanied Clarke on his expedition afterwards re-enlisted in the Illinois regiment, and among others Clarke, who was appointed to command it. This very circumstance has given rise to many confused notions in regard to that regiment. That Clarke's force engaged at Kaskaskia was not the Illinois regiment proper is apparent from the fact that that force was raised solely by the direction of the executive. To organize and keep on foot a permanent regiment surely required some higher authority than this. That authority could alone be vested in the legislature. It is worthy of remark that the first legislation by Virginia in regard to the Illinois country is to be met with in the act before referred to.

There are several other errors in Mr. Bibb's statement, but as they are comparatively immaterial, it is unnecessary to notice them. The main, and, in fact, the only question to be considered in the further discussion of this case is a simple one of identity. In other words, was John Crittenden, who acted as brigade major in the Illinois regiment, and whose claim for half-pay Mr. Bibb represents, the same John Crittenden who was a lieutenant in the continental line and received land as such from the executive in 1783? If it be admitted that they were, then I presume that the claim for half-pay will be abandoned, as the latter has already received from the United States his commutation of five years' full pay in lieu of half pay for life. In my previous reports I have already considered the question so fully that it is almost unnecessary to discuss it again. One or two points, however, may with propriety be again noticed.

Mr. Bibb contends that inasmuch as John Crittenden was not a brigade major in the continental line, Colonel Towles' certificate must have been erroneous, and therefore there must have been two persons of that name. I think the opposite conclusion can be plainly drawn. The very fact that Crittenden was not a brigade major in the continental line is a very strong circumstance to prove the identity of the two men. Colonel Towles was an officer of high position in Virginia, with opportunities of acquiring much knowledge of the revolutionary services of others, and, upon his certificates, land bounty was allowed to many officers and soldiers. It is highly improbable that he would have styled *Lieutenant* Crittenden of the continental line brigade major, unless he was the same person who had just returned from the Illinois country where he had held that rank, and been so designated in his intercourse with his fellow officers.

If Mr. Bibb's supposition be correct, that there were two John Crittendens, and that one of them was a regular commissioned officer in the Illinois regiment, and served as such for six years and four months, why did not this Crittenden apply to the executive and receive the proportion of land to which he would have been entitled according to his rank. The question is not easily answered. No such claim was asserted during his life, but after his death his administrator, Mr. Bibb, himself, in 1809, applied for and received 148 acres, being the *additional* land "due unto the said John Crittenden for his services as an officer in the *Virginia continental* line."—(See paper marked B B.) I can conceive of no evidence more conclusive as to this question of identity.

Again, if, as Mr. Bibb supposes, John Crittenden joined the Illinois regiment as early as December, 1776, or February, 1777, he must have been present with Clarke at the capture of Kaskaskia, and of course would have been entitled to his proportion of the one hundred and fifty thousand acres specially granted by the resolution of assembly to the officers and men engaged in that expedition.—(See Henning, pages 25 and 565.) There is, however, a complete list in this office of the officers and men who received their proportions of this grant, and upon that list the name of John Crittenden does not appear. Is it fair to presume that he would so far have neglected his own interest, or that his rights would have been overlooked by the commissioners appointed to adjust the claims of those entitled, if he had really been present with Clarke during that expedition?

The records of the Illinois regiment in this office are quite voluminous, far more so than those of any other State line regiment. Among other documents, there is a copy of a "return" dated Fort Nelson, 1st September 1782, "of the officers retained in actual, also those considered as supernumerary of the Illinois regiment as they stand arranged at present; their rank and date of commissions, &c." Crittenden's name is again omitted.—(See copy of this paper, marked C C.) Here, then, we have two authentic records of the commissioned officers attached to the Illinois regiment without any reference whatever being made to the existence of any such officer as Crittenden. Is it probable that this would have been the case if he really had belonged to the line of the regiment, and had served in it six years and four months?

I think, upon a full and candid examination of the whole testimony, the conclusion is most apparent that there was only one officer named John Crittenden in the service of Virginia during the revolutionary war. His service, both as regards its nature and duration, can easily be traced. He entered the continental line as a commissioned officer in July, 1777, and continued to serve until, by the Chesterfield arrangement, as it was termed, he became a supernumerary, in February, 1781. Being probably a man of ardent temperament, a life of inaction was, no doubt, most irksome, and he shortly afterwards proceeded to the western country, then the scene of stirring adventure and perilous enterprise, and joined the army as a volunteer, under the command of Clarke. Having, doubtless, acquired much experience of

military affairs while in the continental service, he was selected by Clarke to act as his aid, or, in other words, was appointed brigade major. This post he occupied from the 1st July, 1781, to the 22d of November, 1782, as is shown by the certificate of Clarke and the payment made to him by the auditor of the State. After this period his military career no doubt ended, and he shortly afterwards returned to Virginia. Early in 1783 he applied for and received the proportion of land bounty due to him as a lieutenant in the continental line, and in the following year received the commutation of five years' full pay in lieu of half-pay for life. After his death a different rule of construction prevailed in the allowance of bounty land claims, *constructive* service being then admitted; and, accordingly, in 1809 his administrator applied for and received one hundred and forty-eight acres, being the additional amount due him for a service of four months over and above six years as a lieutenant in the continental line.

Before concluding, it is proper to advert to a single point. It will be seen, by reference to the evidence filed, that before the auditor of Virginia settled the accounts of Crittenden, a resolution of the house of delegates had to be passed directing him to do so. Now, it is difficult to suppose that such action of the legislature would have been necessary if Crittenden had really been a commissioned officer in the Illinois regiment. The accounts of other officers of the regiment were adjusted without their being compelled to resort to the legislature for relief, and there is no reason to suppose that any such invidious discrimination would have been made in reference to Crittenden if he had occupied a position similar to other officers in the regiment. The simple explanation of the fact is, that, owing to his having been a volunteer officer, there was no authority under law to settle his accounts without the special direction of the legislature.

Since my last report was sent to the Secretary, Mr. Bibb has filed two additional affidavits in support of his claim. They only prove that Crittenden was present with the regiment and acted as brigade major in 1781, a fact which has never been disputed.

I have the honor to be, very respectfully, your obedient servant,

J. E. HEATH,
Commissioner.

Hon. A. H. H. STUART,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
September 4, 1854.

The claim of Isaac S. Bowman, executor of Isaac Bowman, deceased, for half-pay, amounting to upwards of \$6,000, alleged to be due him as lieutenant and quartermaster in the Illinois regiment in the war of the revolution, under the act of Congress of July 5, 1832.—(4 United States Laws, page 563.)

The third section (under which this application is made) provides

“that the Secretary of the Treasury (now the Secretary of the Interior) be, and he is hereby, directed and required to adjust and settle those claims of the *Illinois* and other regiments and corps, (previously mentioned,) which have not been paid or prosecuted to judgments against the State of Virginia, and for which said State would be bound on the principles of the half-pay cases already decided in the supreme court of appeals of said State.”

This claim was first presented in 1834. Mr. Woodbury, the then Secretary of the Treasury, rejected it, on account of the “absence of all record proof of the services of Isaac Bowman.”

In 1853 further proofs were exhibited and a decision asked. After an elaborate examination, the Commissioner of Pensions, to whom it had been referred, disallowed it. Upon appeal to the Secretary of the Interior, after a patient investigation, it was again rejected.

Soon after an application was made to both Houses of Congress for relief, and each House adopted a separate resolution referring the case to the Secretary of the Interior for liquidation under the act aforesaid. In conformity with these resolutions the case was once more brought to his attention, and the claimant contended that they were mandatory on the Secretary, (Barbour, August, 1854,) and the opinion of the former Attorney General (Johnson) in the case of Churchill Gibbs was referred to as conclusive upon this point. Dissenting *in toto* from this opinion, and viewing the action of the two Houses in the light of a request rather than a positive instruction, I submitted the question whether these resolutions were mandatory to the present Attorney General, who, in a clear, lucid, and most conclusive argument, has shown the utter fallacy and absurdity of that position. Respect, however, for the action of the two Houses has induced me to re-examine, with much care and labor, the facts and the law of the case, and upon such re-examination, and the reflection I have been able to bestow upon it, I see no cause for changing my former opinion.

In examining such cases it is very difficult to prevent our sympathies from influencing our judgment. A liberal construction should be given to acts for the relief or benefit of soldiers of the revolution. But as to the merits of any particular case, the only safe rule of action is to rely upon the proofs adduced, and discard mere suppositions and assumptions.

The statement of the claimant is, that Isaac Bowman was a lieutenant in the *Illinois* regiment; that in May, 1779, he was appointed a horse master, equal to quartermaster in that regiment; that whilst in service and on duty he was attacked by the Chickasaw Indians, shot down with four balls in his body and limbs, taken prisoner and kept as such from November, 1779, to the month of April, 1780, when he was sold by the Indians to a trader, who carried him to New Orleans, whence he finally reached his home in Virginia; that he was a cripple for life; that the *Illinois* regiment was reduced from May, 1779, to August, 1780, from 350 to 130 men; and that Bowman never resigned his commission, either of his lineal or staff rank, and that it does not

appear that after his capture he was ever recalled to service. Are these allegations sustained by proofs?

The decision of Mr. Secretary Woodbury has never been controverted. The parol proofs, which are the same now as they were when before him, are of a very indefinite and unsatisfactory character—to no great extent either stating, with any degree of certainty, time, place, or circumstances. The only part that is entitled to much weight is the affidavit of Colonel Crocket, and this is so destitute of facts, the particulars of which would naturally be recollected by a person in his position, that, in connexion with the record proofs in the case, the conclusion is irresistible that he must have been mistaken, and probably, after so long a time elapsing since the events alluded to had transpired, he confounded the periods of Bowman's service.

There were two classes of troops coming under the general denomination of the Illinois regiment. First, the officers and soldiers who marched with Colonel George Rogers Clarke, and reduced the western British posts, previous to the year 1779; and secondly, those who, after most of the others had returned to their homes, were incorporated into or remained with the regiment, and constituted what might be called the Illinois regiment proper.—(See 10 Henning, 565.) The former were volunteers and militia, the latter enlisted men. The Illinois regiment proper was composed of the latter, and appears to have been organized in the year 1779.—(9 Henning, 552; 10 ib., 18 to 21.) It is well to mark and remember this distinction, as it will enable us to divest the question of many of the difficulties by which it has been heretofore surrounded.

Much reliance is placed by the claimant on a paper recently discovered and filed in the case, stating that Isaac Bowman was an ensign in his brother's company. From this he infers that as his brother was afterwards promoted, Ensign Bowman became a lieutenant; and hence, that the chain of testimony is complete. In my judgment, this very discovery presents an insurmountable obstacle to the whole claim. There can be no doubt that Isaac Bowman belonged to the troops raised for the defence of the western frontier previous to the year 1779. The records of the auditor's office, in Richmond, Virginia, show that a pay certificate for his services as ensign in Captain Joseph Bowman's company was, on the second day of November, 1775, delivered (among others) to one Isaac Hite for him. I am aware this date is said to be erroneous, but upon further examination it is found to be correct.—(See ordinance of July, 1775; 9 Henning, 61). It appears that commissioners were appointed by the assembly and convention of Virginia to settle the accounts of the militia drawn out into actual service, who made report thereon, and the president of the committee of safety, on the first of December, 1775, issued an order on the treasurer of the State of Virginia for the payment of the claims allowed.—(See auditor's report, August 31, 1854). There is no doubt, therefore, that in that year he was an ensign of that company; and from other circumstances hereinafter noted it is fair to presume he was promoted to the rank of lieutenant, and the probability is, he held that rank when this and the other

companies were disbanded, and the Illinois regiment reorganized in 1779.

If this be correct, and it is the only satisfactory way of solving the difficulty, the case does not come within the provisions of the act of Congress of July 5, 1832. The third section of that act only embraces half-pay cases, for which the State of Virginia would have been bound. This is clearly not such case, because the only act that would have bound that State is that of May, 1779, the requirements of which were not complied with by Bowman.—(10 Henning, 25.)

On the second day of January, 1781, (10 Henning, 564,) Virginia made a *special* grant of a quantity of land, not exceeding 150,000 acres, to the officers and soldiers of the Illinois regiment, (namely, “the officers and soldiers *who first* marched to the British posts with him, and the other officers and soldiers that have *since* been incorporated into the said regiment.”) The board selected to distribute this land allotted 2,156 acres of this special grant to Isaac Bowman, being his share as a lieutenant. It will be perceived that these lands were granted, and so they were allowed to these officers and soldiers, militia as well as enlisted men, without discrimination. It was a *special* grant, intended to comprehend all who had been in the western service. There existed also a *general* law in Virginia, granting to every subaltern of the Virginia line and the continental or State establishment 2,000 acres of land, (10 Henning, 160,) which was afterwards increased one-third, (10 Henning, 375,) making in the aggregate 2,666 acres. There is no evidence showing that he ever applied for or obtained bounty land from the State under this general law. He only received his proportion of the special grant of 150,000 acres. His name appears upon the list made out by the board (of which Colonel Clarke was a member) as a lieutenant; but it is not stated in the list, or otherwise shown, to what company he was attached, nor for what time or term he served, nor whether he belonged to the first or second class of the Illinois regiment. His receiving his quota of the special grant is not even conclusive that he belonged to either class, as I understand it is admitted by the claimant that there were others that received a portion of this grant who never belonged to that particular regiment.

Much force is attached by claimant to a certificate, dated August 29, 1834, given by John Douthitt, clerk of the board of commissioners of the Illinois grant. All that he certifies to is, that it appears “from the books and papers in this office that Isaac Bowman served in said Illinois regiment as a lieutenant, and that he was allowed 2,156 acres of land in said Illinois grant.” It is evident he referred to the proceedings of the board appointed to make the distribution, as he speaks of nothing else. His certificate is of no more importance than that of any other person having the books and papers, and the claimant and others have produced all of them that are deemed material. He does not, in any other way than as above stated, give the grounds or reasons of his belief, nor does he profess to have any other knowledge of the facts. At best it is a mere opinion, and even as such it does not discriminate between the two classes of officers and

soldiers usually denominated the Illinois regiment. It occurs to me that it should not have much weight. It certainly is not entitled to the consideration given to it by the claimant.

On the 15th of November, 1779, Isaac Bowman, with several men and families, set off from the Kaskaskia for the falls of Ohio. The object, at least of a majority of the party, appeared to be to make a settlement. They were attacked by the Indians and defeated. He was severely wounded and taken prisoner. Notwithstanding an account is given of his departure and point of destination, by John Todd, jr., the county lieutenant or commandant of the county of Illinois, it does not appear that he went in any military capacity, or was clothed with any military power. Mr. Todd calls him Mr. Isaac Bowman, and says, in his communication of June 2, 1780, to the executive of Virginia, that he judged it safe to send to the falls many articles belonging to the commonwealth, by Bowman, but he does not intimate in anywise that Bowman was an officer, nor does he give him any military title whatever. From the papers and testimony on file, it is fair to presume Isaac Bowman was, at that time, acting under the authority and by the direction of Todd, who had no power to appoint any such officer as Bowman is represented to have been.—(9 Henning, 552.) If he was an officer, and had (as is claimed) a furlough, from whom did he obtain it, and where is the proof of it?

After his release from captivity and return to Virginia, he presented to the commissioners, appointed by the executive of Virginia to settle and liquidate claims in the western country, an account for services as horse master in the Illinois regiment, from May 12, 1779, to October 11, 1780; about the date of his return. He claimed, under oath, not as lieutenant or quartermaster, but as horse master; an officer, so far as I can learn, unknown to the military organization of that or any other period. Appended to his account is the certificate of Colonel George Rogers Clarke, the commandant of the Illinois regiment, that *Isaac Bowman* was appointed horse master in the Illinois department (*not the Illinois regiment*) in the year 1779; but how long he continued he knew not. The commissioners allowed him a *per diem* compensation up to the time of his capture, and refused the balance, because they were of opinion he was out of the service of the State at the time he was captured, and consequently had no legal claim for the time he remained in captivity; but referred it to the consideration of the executive. It seems remarkably strange that neither he himself, nor his commanding officer, nor the commissioners, whose duty led them to inquire strictly into all such matters, did not know that he possessed a military commission known to the law; but that it should have been discovered by the ingenuity of others so long after his death. So far from the commissioners recognizing him as possessed of any military rank, they expressly discriminate against it. They do not allow him the pay of a quartermaster, but a given sum per day, being equal to a quartermaster's pay. There is nothing in the action or proceedings of the board evincing any disposition to consider "horse master" as the synonym of quartermaster. It is plain that they viewed his services as of a civil character, and

only referred to the pay of quartermaster as a measure of compensation. Besides, they could not, by any military law or practice, have refused him pay during his captivity, had he been a commissioned officer. If he considered himself wronged by this decision of the commissioners, why did he not press the appeal to the executive? It is alleged, as an excuse for this failure, that it was not decided until 1792, in Virginia, that a prisoner on parole was in service; (Barbour, July 25, 1854) but this is not a parallel case, he not being on parole, but in captivity. Suppose, however, that he was on parole, how is his inattention to the appeal, from 1792 to the period of his death (1826) accounted for? If he was a commissioned officer at the time of his capture, how easy it would then have been for him to prove the fact by his brother, Colonel Crockett, Mr. Todd and his brother officers, and others who were living near at hand, and must of necessity have been well acquainted with all the facts. Again, if the claim is just and legal he was a commissioned officer in the Illinois regiment proper. That he was severely wounded and disabled in the rencounter with the Indians, is undoubted. But the act of May, 1779 (10 Henning, 21) expressly provides that all of that regiment who might be disabled in the service, should be entitled to receive *full pay* during life. Why did not he or his representatives take advantage of the provisions of that act? It was not a mere gratuity, the act having passed before the disability was incurred. No objection could therefore have been urged against it by the most sensitive and fastidious. The only inference that is legitimately deducible from his neglect to embrace the provisions of the law, is that he knew he had been employed in the civil capacity of horse master, and that it was a civil trust, such as wagon master, forage master and the like. On any other supposition, his conduct is incomprehensible. Had he held a military commission, his pride would have been stung by the action of the commissioners, and he could not have been induced to acquiesce in a decision, which under such circumstances would have detracted from his standing as an officer and his character as a man, and would have deprived him most unjustly of compensation and pay, to which he would have been clearly entitled. His silence must be construed into a concession of the justice of their judgment.

But it is urged that this view impugns the conduct of his commander, Colonel Clarke, in agreeing to his name being placed on the list above mentioned, as a lieutenant. So far from it, I imagine it to be the only way in which his actions can be satisfactorily explained and reconciled. In 1783, when everything was fresh in his recollection, he certified to Bowman's being a horse master, and in 1784 he admits him to have been a lieutenant; that is, as we conceive it to be, Bowman was a lieutenant previous to 1779 and before he was wounded, and horse master at the time of his misfortune and captivity. This is the only solution of the mystery that can be given, which is at all consistent with the proofs. Colonel Clarke did not know how long Bowman remained, as horse master, in the service. Why? because he was employed for an indefinite period—perhaps at the pleasure of the commanding officer, in a civil capacity. Is it to be supposed that

if Bowman was commissioned, and the commission (as I believe the law required,) ran for a definite period, Colonel Clarke would have been ignorant of it, or that he would not have stated it in his certificate and have been explicit as to time? Besides, the law itself, authorizing the appointment of the officers of that regiment, prescribes their number and rank, and does not embrace any such officer as that of horse master.

The record no where names him quartermaster. The only approach to such recognition is "the small book" referred to in the certificates produced from Richmond, upon the first page of which is written—"Plunder store acct. Mr. Isaac Bowman, Q. M. a/c." This book was kept by himself; admitting it to have been kept correctly, there is no difficulty in harmonizing it with the other proofs. It is possible, nay probable, that in the capacity of horse master, he may have occasionally acted as quartermaster, in the absence of the regular officer, discharging such duties. If he had been quartermaster, or if horse master and quartermaster were synonymous, he surely would not have adopted the designation of horse master in preference to quartermaster, when he knew the latter was authorized by law and the former not; nor would his commanding officer have given him any such title.

In the account of public horses, delivered in the western and Illinois department, under the direction of the quartermaster general, William Shannon, there is this entry: "1779, June 14, delivered Captain Bowman, H. M. as per receipt 38" (horses.) Here he is designated as captain, and the claimant perceiving the confusion produced by it, attempts to explain it by saying—a lieutenant holding a staff appointment was called captain—but adduces no proof of the fact. From this however, he can argue that he was really at that time a captain in the regiment, with the same propriety and as much force, as from the other proofs produced, that he was actually a lieutenant and staff officer at the time of his capture, or at any period after the reorganization of the regiment. The memorandum of Mr. Shannon merely shows how little reliance is to be placed in the military titles given in such papers.

It is contended that Bowman was a supernumerary officer, but of this, I have not been able to find the slightest testimony. The regiment was never full, and after its reorganization it was very much reduced; but the facts show that the reduction was from ordinary causes, and not by operation of law or the authority of the executive.

In the journal of the western commission of Virginia, it is stated, "that the papers of Major Joseph Bowman and Captain Isaac Bowman were laid before the board, which were examined, and finding them necessary for the settlement of other accounts, (they) took them with them to the falls of Ohio." This is all that is said about these papers, and yet it is insisted with much earnestness, that because the commissioners took the papers of Isaac Bowman to the falls of Ohio, the claimant is deprived of the power of producing them, and deriving from them valuable information which might sustain his claim. This is hardly worthy of a passing remark, because the papers were taken in January, 1783, and his account was settled in

June of the same year. It is to be presumed, they were returned to Mr. Bowman, or were public papers of which he had not the proper custody; or they were of little value to him, as he never uttered any complaint about it. The nature of the papers is unknown, and it might be argued that if produced, they would as likely prove unfavorable as favorable to the claim.

Of a like character, is the assertion that he lost his commission when captured. It does not appear that he ever had one, and until that is shown it would be difficult to prove that he lost it.

It is stated that by the decisions of the highest judicial tribunals of Virginia, one witness is sufficient to prove a claim. Without admitting that we are bound by decisions merely involving the proof necessary to sustain such claims, it is a sufficient answer that those decisions must relate to cases where there are no conflicting proofs, and where the testimony of the witness is unimpeached. Otherwise it would be an exceedingly unreasonable rule.

From the preceding review of the whole case, I have been led to the following conclusions:

If Isaac Bowman was a lieutenant in the Illinois regiment, it must have been soon after he was ensign (1775,) and when the militia constituted the regiment prior to its organization in 1779, and by no law that has been cited, was he entitled to half-pay therefor.

That his own admissions under the solemnities of an oath, the certificate of his commanding officer, and the decision of the commissioners appointed to decide upon such claims, show him to have been merely a horse master, and not a commissioned officer in the eye of the law.

That the fact that neither he nor his representatives, previous to the passage of the act of Congress of July 5, 1832, ever (after the decision of the commissioners) claimed his pay during his captivity, nor the pension authorized to be paid by the law of Virginia, of May, 1779, prove conclusively both his and their acquiescence in the decision of the said commissioners.

R. McCLELLAND, *Secretary.*

IN THE UNITED STATES COURT OF CLAIMS.

ISAAC S. BOWMAN and GEORGE BRINKER, surviving executors of Isaac Bowman, petitioners, *vs.* THE UNITED STATES, defendant.

This claim is for half-pay due the testator, Isaac Bowman, in his lifetime, for his services as lieutenant in the line, and quartermaster (otherwise called horse-master) in the staff, in Colonel George Rogers Clarke's regiment, called the Illinois regiment, under the act of Virginia of May session, 1779, (10 Henning's Statutes, p. 25,) by which "All general officers of the army, * * * all field officers, captains, and subalterns, commanding, or who shall command in the battalions of this commonwealth on continental establishment, or serving in the battalions raised for the immediate defence of the State, or for the defence of the United States, and all chaplains, physicians, surgeons," &c., &c., * * * "provided Congress do not make some tantamount provision for them, who shall serve henceforward, or from the time of their being commissioned until the end of the war; and all such officers who have or shall become supernumerary on reduction of any of the said battalions, and shall again enter into the said service, *if required so to do*, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half-pay during life, to commence from the determination of their *command or service*."

Congress did make provision for half-pay for life for the officers of the continental army, by resolution of May 15, 1780, (Journals of Congress, by Way & Gideon, vol. 2, p. 554,) amended by resolve of August 11, 1779, (vol. 3, pp. 536, 537,) extended to the widows and orphans of those officers "who have died or shall hereafter die in the service;" by resolve of August 21, 1780, (same vol., pp. 512, 513,) amended by resolve of August 24, 1780, so as to include officers reduced, (same vol. pp. 538, 539;) finally commuted for five years' full pay, with interest at six per centum per annum, by consent of the officers, the mode of taking such consent being provided for by the resolve of March 22, 1783.—(1 vol. of Journals, by Way & Gideon, pp. 178, 179.)

This provision by Congress, confined to the officers on continental establishment, left the State of Virginia to pay the officers of the army for her own internal security and defence, according to the promises made by the aforementioned act of May, 1779, (10 Henn., p. 25,) extended to the officers of the navy.—(Nov. sess., 1781; 10 Henn., p. 467, chap. 19, sec. 14.) By the act of Congress approved July 5, 1832, (4 Stat. at Large, by L. & B., p. 563, chap. 173,) the United States assumed the payment of the debts so contracted by the State of Virginia.

The merits of this claim are fully set forth in the report of the Committee of the Senate on Pensions, of February 13, 1854, No. 101, concurred in by the Senate, and in the two reports of the House of Representatives on revolutionary claims, of February 16, 1854, No.

106, and on June 30, 1854, No. 275, concurred in by a resolution of the House, copies of which are filed.

The proof exhibited by the executive department, and by that communicated to Congress, is so clear and satisfactory as to the merits of this claim that it was, no doubt, matter of surprise to the Congress that the executive department should have rejected the claim wholly and totally, and so, I doubt not, it will be to this court, upon reading the evidence certified from the executive department to Congress, an authentic copy whereof is filed, (exhibit A,) and especially that the executive department should have persisted in the total negation of the claim after the resolutions of the respective houses of Congress.

For proof of Isaac Bowman's services as lieutenant and as quartermaster, (otherwise called horse master,) I refer to exhibit A, pp. 3, 6 to 9, 18, 19, 20, 28, and 29.

The legislature of Virginia, by resolution of 2d January, 1781, (10 Henn., p. 565,) and act of October session, 1783, (11 Henn., p. 327,) granted to the officers and soldiers of Clarke's regiment (called the Illinois regiment) a tract of land of 150,000 acres to be divided among them.

By act of Virginia of October session, 1783, (11 Henn. 335, chap. 21,) commissioners were appointed to divide this land among the officers and soldiers of Clarke's regiment, and to assign to those entitled their respective purparts in severalty.

That board, consisting of ten persons, whereof six were officers of Colonel George Rogers Clarke's regiment, and said Clarke himself, as president of the board, awarded to Isaac Bowman, as lieutenant, 2,156 acres of land.—(Exhibit A, pp. 8, 9.)

The official report of John Todd, county lieutenant, to the governor of Virginia, gives (A, pp. 28, 29) a detailed statement of the capture of Isaac Bowman by the Chickasaw Indians in November 1799, when he was ascending the Ohio river in charge of boats, stores, and families, destined for Louisville, under the order of Colonel George Rogers Clarke.

Isaac Bowman died 9th September, 1826.—(Exhibit A, p. 26, Yost and Kercheval, and other proof filed.)

The governor of Virginia, upon receiving the proclamation of Congress of 11th April, 1783, "declaring the cessation of arms, as well by sea as by land, agreed upon between the United States of America and his Britannic majesty, and enjoining the observance thereof," (4 Journals of Congress, by Way & Gideon, p. 186,) on the 21st April, 1783, issued his proclamation, and ordered that the troops of Virginia on the State establishment for the internal security and defence of the State be discharged.—(11 Henn., pp. 551, 552.) Wherefore, the 22d April, 1783, has been uniformly taken as the end of the war in Virginia, in relation to the claims of the officers of the State establishment for service to the end of the revolutionary war, and so it is said in Marston's case, 9 Leigh's Va. Rep., p. 38.

That Isaac Bowman was in service, as a lieutenant in George Rogers Clarke's regiment, in November, 1779; that he was then captured in service, in the line of his duty, in obeying the orders of Col-

onel Clarke, and carried into captivity, is satisfactorily proved. The report of John Todd (county lieutenant) to the governor of Virginia, and the award of the board of commissioners to said Bowman, as lieutenant, for his purpart of the 150,000 acres of land granted to Clarke's regiment, (Exhibit A, p. 6 to 9, and pp. 28, 29,) leave no loop whereon to hang a doubt. And in the same document we find that said Bowman was paid by the State of Virginia the arrearage of his monthly pay as quartermaster (otherwise called horse master) up to the time of his captivity; and it appears therein that the officers appointed to audit and adjust the accounts of the Illinois regiment thought that Bowman's captivity in November, 1779, had deprived him of pay beyond that period.

With the question of arrearages of whole pay per month, due to Bowman before the conclusion of the war, we have nothing to do. His half-pay for life, after his discharge from the service, under the proclamation of the governor of Virginia for disbanding all the State troops, is the subject of inquiry now before the court.

Captivity no cause for withholding the pomised half-pay for life.

I need not labor to show that Lieutenant Bowman, by being taken prisoner of war and held in captivity, did not thereby forfeit the protection of his government; that he was, nevertheless, to be cared for, exchanged or ransomed. If so, it might be that he did not thereby forfeit his commission as an officer, nor his half-pay for life after the conclusion of the war.

In Markam's case, decided in the supreme court of appeals of Virginia, in April, 1830, (1 Leigh, 516, to 523,) it appeared that James Markam was a captain in the navy of the State of Virginia, commanding the vessel-of-war "The Tempest," when, in April, 1781, "The Tempest" was captured by the British forces. Markam and others were taken prisoners of war. Captain Markam was parolled on the 20th April, 1781, and continued an unexchanged prisoner of war until the return of peace; nevertheless, he was adjudged entitled to half-pay during his life, under the act of Virginia of October session, 1779, and November session, 1781.—(10 Henn., 25 and 467.) In that case Judge Green cited the previous decision in the case of Churchill Gibbs, who was taken a prisoner of war in May, 1781, and continued a prisoner until the end of the war, and was nevertheless adjudged entitled to his half-pay for life.

Resignation or sentence of dismissal not to be presumed.

If, after his captivity, Isaac Bowman resigned, such resignation must have been tendered in writing and assented to by the government, as provided by the ordinance of December, 1775.—(9 Henning, pp. 95, 96, chapter 4.)

That a military officer has not the right to resign his commission, otherwise than with the consent of his government, is a universal principle of military law, existing before and ever since the express

declaration to that effect in the ordinance above quoted. If military officers had the right of their own mere will and pleasure, and without the consent of their government to resign and quit the service, then an important military enterprise, or the military strength, order, and discipline, on the eve of an expected battle, might be paralyzed by such voluntary and unaccepted resignations of officers.

The affirmative, that an officer had resigned his commission, must be proved by the affirmant; it is not to be presumed.—(Marston's case, 9 Leigh, p. 42.)

So, likewise, it is not to be presumed that Bowman was cashiered, dismissed from service by sentence of a court martial, nor that he was guilty of disobedience of any order whatever, particularly to that of being ordered to join his regiment and refusing so to do, thereby to forfeit his claim to half-pay for life after the conclusion of the war.

The burden of proof of all and every of such affirmatives would be on the party affirming. Negatives, in general, are incapable of being proved; are not required to be proved; the maxim is, "*De non apparentibus et non existentibus eadem est lex.*"—Coke, 2 Institute, 20, (6.)

Supernumerary officer entitled to half-pay during his life.

If Lieutenant Bowman became a supernumerary officer by the reduction of Colonel Clarke's regiment, (which, however, does not appear,) yet that would not have debarred him of his half-pay during his life, he having been in actual service as lieutenant and quartermaster in November, 1799, when taken prisoner of war. So it was adjudged in Lilly's case, April, 1830, (1 Leigh's Rep., 525,) and Markam's case, (9 Leigh, 36.)

Of Commutation of half-pay

The Congress of the confederation, by resolve of March 22, 1783, proposed to the officers on continental establishment to commute their half-pay for life, promised by former resolves, for five years' full pay, in compensation of the half-pay for life.

It will be seen by that resolution of Congress that those entitled to the half-pay so proposed to be commuted were permitted to accept or refuse this commutation, in the manner and time mentioned in the resolve. The Congress treated the claims of these officers to half-pay as contracts not to be modified by the one party without the assent of the other. The continental regiments accepted the modification of five years' full pay, with interest until paid, in commutation and compensation for half-pay for life; so certificates were issued to continental officers, as well to those who were in actual service to the end of the war as those who had, by reduction and derangements of regiments, been thrown out of command and actual service as supernumeraries, but liable to be again called into actual service if necessity had required. These certificates were for five years' full pay, bearing interest at the rate of six per centum per annum until paid.

The State of Virginia had not, during the war, promised nor proposed to the officers on the State establishment for internal security and defence, five years' full pay in commutation of the half-pay for life, engaged by the act of 1779. But on the 16th of December, 1790, the legislature of Virginia enacted, (Session Acts of that year, p. 12, chap. 21—Henning's Statutes, vol. , p. ,) "that the same compensation of half-pay should be extended to those officers of the State line who continued in *actual* service to the end of the war, as was allowed to the officers of the continental line, and also to those who became supernumerary, and being afterwards required, did again enter into *actual* service and continue therein to the end of the war."

This act of 1790 the courts of Virginia construed as allowing five years' full pay and interest in lieu of half-pay for life, to such claimants as should ask for the commutation and were in *actual* service at the end of the war.

It is evident that this act of 1790 (passed after the end of the war) could not be compulsive upon the officers of the State line (nor upon their representatives) who had become entitled to half-pay during life, under the act of 1779. It could not, without the consent of those entitled to half-pay for life, reform, alter, and impair the obligations of the contracts between the State and its officers who had served the State under the terms held out in the act of 1779.

No mode of election to accept or to refuse the provision of this act of December 16, 1790, was pointed out in the act itself; therefore the claimant, after the act of 1790, was at liberty to ask the gratuity allowed of five years' full pay and interest, or to insist upon the contract for half-pay during his life. This act of 1790 was passed seven years after the return of the peace, and after the several States, by their respective conventions, had ratified and put into operation the Constitution of the United States, whereby it is ordained that "no State shall * * * pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The legislature of Virginia, by this act of 1790, intended to give to the officers within its purview a benefit; not to take away anything which had been promised by the act of 1779. It does not intend nor wear the semblance of an attempt to impair the obligations of the contracts of the State with her officers for half-pay during life, which accrued under the act of 1779; a matter prohibited by the Constitution of the United States. The effect of that law of 1790 is to add, not to subtract.

The executors of Isaac Bowman insist upon half-pay during his life, (without interest,) because it is more beneficial than five years' full pay, with interest at the rate of six per cent. per year, from the end of the war until paid.

Of conditions.

The inducement of half-pay for life, held out by the act of 1799, accepted by the officers who continued in service until the end of the war, or became supernumerary, and were no longer required by the State to exercise their commands "in the same or any higher rank,"

became contracts—terms proposed by the one party and accepted by the other. This is the view taken by Judge Coulter, in his opinion delivered in Lilly's case, 1 Leigh's Reports, 525, before cited. The State employed the officers for its military service during the war. The officers who were in the performance of their part of the contract left their homes and private affairs; risked their health and lives in the military service of their country; fought with halts about their necks, to be hung as traitors, and their estates confiscated and escheated, if Great Britain prevailed over the rebels.

These were valuable considerations. Since the success of the revolution, and our independence of the crown of Great Britain, those officers claim the promised remuneration for such privations, hardships, and risks, to be maintained during their respective lives upon half pay, promised by the act of 1779.

According to the well-settled principles respecting the obligations of contracts and conditions, if the officers who were in the performance of their parts were prevented by the State from further performance, by not providing privates to be commanded; by reducing the military establishment, and creating supernumerary officers; or by discharging the officer from service before the end of the war, for any cause whatever, other than for the crime, misbehavior, or default of the officer himself, the State was bound to the officer equally as if he had been in actual service to the end of the war.

In Coke Litt. 206 *b*, that profound lawyer tells us, "If a man make a feoffment in fee upon condition that the feoffor shall re-enfeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be passed, the estate of the feoffee is absolute, for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for the non-performance thereof. So if A be bound to B, that J S shall marry Jane G before such a day, and before the day B doth marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases."

"It is a rule common to all the conditions of obligations, that they ought to be holden to be performed when the debtor who has obliged himself under the condition has prevented its performance."—(Pothier on Obligations, part 2, chap. 3, art. 3, sec. 212, in Newburn edition of 1802, p. 127.)

To these authorities I add—

Domat's Civil Law, book I, title 1, §§ 4, 17—Paris edition of 1777, page 29; English edition, page 186, § 220.

Robinett vs. Ship Exeter, 2 Rob. Admiralty Report, 261.

Simmonds vs. Roberts, 3 Esp. Report, 71.

Beeston vs. Collyer, 4 Bing. 309.

French vs. Brooks, 6 Bing. 354.

Fawcett vs. Cash, 5 Barn. and Ad., 904.

Williams vs. Byrne, 7 Ad. and Ellis, 177.

Gandell vs. Pontignay, 4 Camp. 375.

Alder vs. Keighly, 15 Meeson and Welsby, 117, 130—in the Exchequer.

Touchstone, Obligation, p. 392.

Powell on Contracts, pp. 417, 418, 419, 420.

Abbot on Shipping, part 4, chap. 2, page 443.

Puller *vs.* Stanforth, 11 East, 232.

Kean *vs.* Ship Gloucester, in Federal court appeals, 1782, 2 Dallas, 38.

Ex parte Giddings, 2 Gallison Rep. 56.

Mahoon *vs.* The Gloucester, 2 Peters's Ad. Rep. 403.

Emmerson *vs.* Howland, 1 Mason, 51, 52.

Hoyt *vs.* Wildfire, 3 John. 518.

Johnston *vs.* Dalton, 1 Cowen, 543.

Brooks *vs.* Dorr, 2 Massachusetts Rep. 39, 42, 47, 48, 49.

Luscomb *vs.* Prince, 12 Massachusetts Rep. 576.

Costigan *vs.* M. and H. Railroad Company, 2 Denio, 609.

Marshall *vs.* Craig, at Common Law, 1 Bibb, 386.

Marshall *vs.* Craig, in Chancery, 1 Bibb, 394.

The law relating to conditions in contracts, so long established, so prevailing in Europe and America, in the courts of admiralty adjudging according to the law of nations, in courts of common law, in courts of equity, and in the civil law, is a rule of reason, a rule of natural justice and moral equity essential to the preservation of good faith in the performance of contracts. Princes, whether they be monarchies, oligarchies, republics or democracies, are morally bound to fulfil their engagements. They have no privilege to be faithless; no prerogative to deal deceitfully with their subjects or citizens.

Hence it follows that the promise of half-pay for life to the officers who should enter into the service "and continue therein until the end of the war," is coupled with the implied condition, inevitably and necessarily understood, "unless sooner discharged by the will of the government."

The period of time at which the half-pay is to commence.

The rule of justice and equity in respect of conditions in obligations, "that they ought to be holden to be performed when the debtor who has obliged under the condition, has prevented its performance," connected with the proclamation of the governor of Virginia for discharging the troops on State establishment makes it useless, wholly unnecessary in this case to pursue and decide technically and critically the precise period of time at which the revolutionary war between the United States and Great Britain was at an end in the State of Virginia; whether on the day when the governor of Virginia, having received intelligence of the provisional articles of a treaty for a cessation of hostilities by sea and land, issued his proclamation for the discharge of the State troops, or at the several and respective days on which the several battalions, corps and companies received notice of the governor's proclamation, or at the time when the Congress of the United States issued their proclamation of the definitive treaty of peace and the discharge of the continental troops; or when the continental regiments or corps received intelligence of that proclamation announcing the definitive treaty of peace, and commanding them to conduct themselves accordingly.

There is a difference between a theoretical end of a war by a treaty of peace signed and a practical, actual end of war. The hostile forces of the invaders may be expelled or captured, and so the war may cease ; or after a treaty of peace the war may continue in fact in the distant places on sea and land until notice of the treaty shall be given to belligerent forces there. The ninth of the provisional articles of peace between the United States of America and his Britannic majesty, signed at Paris, November 30, 1782, illustrates the distinction. The treaty of peace between the United States and Great Britain was signed at Ghent on the 24th December, 1814, and on the 8th January, 1815, the great battle at New Orleans was fought between the forces of the United States and those of Great Britain ; neither of the generals commanding the hostile armies there arrayed having notice that such a treaty had been signed. As the theoretical and the practical end of the war may be of different times, the one or the other may be applied to different cases, according to their circumstances and subject matter.

The Congress had the authority to discharge the troops furnished for the gendral defence by the respective States, according to their respective quotas, under the articles of confederation, but had no authority whatever either to discharge or to keep in service the troops raised by the State of Virginia for her own internal security and defence. Virginia alone had the authority to retain or discharge those troops ; and had an unquestionable right to discharge them in part or in whole, whenever she pleased so to do. Nevertheless the State, by discharging those, her military forces, before the Congress had proclaimed the end of the war and the discharge of the troops in the continental service, could not thereby impair the obligations of the State for half pay for life to her officers on the State establishment for internal security and defence of the State, which had accrued under the said act of 1779.

The proclamation of the governor of Virginia, of April, 1783, announcing the provisional articles of peace, (as made known by the Congress,) and for the discharge of the troops on the State establishment, has been uniformly taken as the time from which the half-pay of the officers of the State line of Virginia should be computed as for service until the end of the war. So it is stated in Marston's case, (9 Leigh, p. 38.) Such has been the practice in the administration of the third section of the act of Congress, approved July 5, 1832; but supernumerary officers are entitled "to half-pay during life, to commence from the determination of their *command*."

The act of Congress of July 5, 1832, whereby the United States assumed to pay these debts of half-pay due by the State of Virginia to her officers on State establishment, particularly mentions "the regiments of Colonels *Clarke* and *Crockett*, and Captain *Rogers*' troop of cavalry, who were employed in the Illinois service," and directs an adjustment and settlement "of those claims for half-pay of the officers of the aforesaid regiments and corps, for which the State of Virginia would be bound on the principles of the half-pay cases already decided in the supreme court of appeals of said State."

Before this act the two cases had been decided in the supreme court of appeals of the State of Virginia; Markam's case, in 1830, (1 Leigh, 516,) and Lilly's case, (1 Leigh, 525;) the principles whereof are conclusive in favor of Lieutenant Bowman's right to half-pay.

Rate of pay and amount of half-pay.

The State of Virginia, by the acts of October session, 1776, and May session, 1778, (9 Henning, 194, chap. 23, and 452, chap. 3,) enacted that the officers and soldiers raised for the internal security and defence of the State "shall be entitled to the same pay and rations, be subject to the same laws, articles, and regulations, as are established by the general Congress for the pay and government of the continental troops." And again, by act of October session, 1780, (10 Henning, p. 389, chap. 32,) it was enacted, as to the regiment under Colonel George Rogers Clarke's command, that it be recruited and fully completed for the defence of the western frontier against the invasions of the British and Indians, and that the officers and privates of said regiment "be allowed the same pay and rations with other officers and privates on continental establishment."

The Congress, by resolve of 27th May, 1778, (Journals by Way & Gideon, vol 2, p. 567,) fixed the establishment of the American army, and the pay of a lieutenant of infantry at twenty-six two-thirds dollars per month; of a quartermaster, to be taken from the line, at thirteen dollars per month, in addition to his pay as an officer in the line.

The uniform construction and practice has been that an officer in the line, who held also an office in the staff or field, is entitled to half the pay, during life, attached to both the offices. So Isaac Bowman's *half-pay* (for both offices) was at the rate of nineteen dollars eighty-three and one-third cents (\$19 83) per month, or two hundred and thirty-eight dollars per year, to which he was entitled from the governor's proclamation, April 22, 1783, to his death, on 9th September, 1826, forty-three years, four months, and seventeen days, making the sum of \$9,324 80, for which a decree is prayed most respectfully.

GEO. M. BIBB,
For petitioners.

IN THE COURT OF CLAIMS.—No. 177.

EXECUTORS OF ISAAC BOWMAN *vs.* THE UNITED STATES.*Brief of United States Solicitor.*

This is a claim for half-pay for life, under the Virginia resolution of May, 1775, the obligations of which the United States have assumed by the act of July 5, 1832.

To entitle the claimant to the benefits of the resolution of May, 1779, and consequently to sustain this claim under the act of July 5, 1832, the petitioner must show—

1st. That his testator was a general officer, field officer, captain, or subaltern, in one of the regiments described in the resolution; and the averment is that he was a lieutenant in Clarke's Illinois regiment.

2d. That he served to the end of the war, or became supernumerary by the reduction of the regiment; and the averment is understood to be that he served to the end of the war.

The questions are questions of fact, and the record evidence may be considered under three heads: 1. Contemporaneous documents, being of the date when he was in service; 2. Those relating to the allowance of his claim for pay; 3. Those connected with the allowance of his claim for land. There is also some parol testimony, taken in 1834, not admissible under the rules of this court, but no objection is made to its receiving such consideration as it may appear entitled to in deciding a nice question of fact more than fifty-four years old.

I. Was Isaac Bowman a commissioned officer? The evidence establishes that Isaac Bowman was appointed "horse master" in Clarke's regiment in May, 1779, and served until he was captured by Indians, November 17, 1779. It is contended by the petitioner that a horse master was a quartermaster, and that a quartermaster was a lieutenant. On the part of the United States it is denied that a horse master was equivalent to quartermaster, and no evidence is adduced on the part of the petition to prove it.

Contemporaneous documents.

These consist of receipts taken by Bowman for public moneys disbursed by him; of accounts of public stores kept by him; and accounts of public stores in which he is charged; and of an official letter reporting the defeat of his party, and his supposed death. In none of these is any military title given him. He is invariably called plain Mr. Bowman, or Mr. Bowman, horse master, with a single exception. In one of the entries thirty-eight horses are charged to "Captain Bowman, horse master." Now it is not alleged that he was a captain, for then he could not have been quartermaster. It was a random title by which he seems to have been called by his friends, and its use in the document cited proves that he was not a lieutenant by commission. All the contemporaneous documents are of a character in which the official designation of every officer should have been,

and no doubt was given, and in all these Mr. Isaac Bowman, horse-master, stands in juxtaposition with lieutenants, captains, and majors, who receive their full military titles. See, for instance, the three leaves from the ledger: on one stands "Dr. *Mr. Isaac Bowman*, Cr.;" on the next, "Dr. *Captain Edward Worthington*, Cr.;" and on the next, "Dr. *Major Joseph Bowman*, Cr." I understand these to be the accounts of John Reed, as they are preceded by a certificate proving that he was quartermaster of the regiment during the period of the entries, but a note on the first page goes to show that they may have been Bowman's accounts. This does not help the petitioner's case. Any one, and particularly any employé, having charge of quartermaster's stores, might have quartermaster accounts. But if these were Bowman's accounts, then as he, in both places where his name occurs, gave himself no military title, while he gives it to others, it proves he had no military rank.

Evidence produced to obtain pay in 1783.

In this year sat a commission in Richmond, under act of June 21, 1781,* to settle claims growing out of the Illinois expedition.

Bowman stated his account and presented it to this commission. In it he makes no military title, and charges for his "services as horse master"—nothing else. He names no sum, but leaves that to be determined by the commission. The omission of any designation of military rank, and the omission to name the rate of pay, are pregnant with meaning. If he had been a commissioned officer his pay would have been determined by his rank, and he could not have failed to state both.

In support of this claim he produced the certificate of Colonel Clarke, the commander of the regiment: He certified that Mr. Bowman was appointed horse master, &c., giving him no military rank.

Then follows his own affidavit that he was horse master.

The board awarded him pay for services as horse master; allowed him six shillings and four pence per day—"equal to the pay of a quartermaster"—not that he was a quartermaster—this is impliedly denied—but he deserved as much.

The board computed pay only up to the day of his capture by the Indians; he charged pay for the time he was in captivity, and if he had been an officer it would have been allowed. Officers were universally paid while in captivity.

The board found that he was out of service by his capture. Such an allegation respecting an officer would have been incorrect.

All that has thus far appeared, down to 1783, not only fails to sustain, but contradicts the allegation that Bowman was a commissioned officer.

* See section 5 act of May, 1782, (11 Hum. St., 83,) as to settlements by officers with the Auditor.

Grant of bounty land in 1784.

By an act of Virginia, in 1781, providing for the cession of the Northwestern Territory, 150,000 acres were reserved for Clarke's regiment. (10 Henning's Statutes, p. 565.) By an act passed at October session, 1783, (11 Henning's Statutes, p. 335,) a board was constituted to apportion these lands. On the 4th of October, 1784, they made a list of claims allowed and disallowed, in this form:

John Williams, captain ;
George R. Clarke, brigadier general ;
George Walls, not allowed ;
John Jones, soldier ;
Isaac Bowman, lieutenant.

It is contended for the petitioner, that the entry of lieutenant opposite Bowman's name, proves that Bowman was lieutenant. As General Clarke and other officers of the regiment sat upon that board, it is admitted that if the entry above cited means that Bowman was lieutenant, it is very strong evidence in favor of the petitioner. But, nevertheless, it is to be considered that the main business of the board was to distribute the lands, not to determine the rank of officers, and they might perhaps consider some one who had done good service and was fairly entitled to an officer's share, to be such for this purpose, though he was not actually commissioned. And it is in this way, I think, that Bowman's name appears as lieutenant on the list.

By the act above cited of 1783, the board was directed to be governed by the allowance made to continental officers ; and this allowance was apportioned exclusively according to line rank.—(See 10 Hen. Stat., p. 160.) It is therefore suggested, that the rank set opposite each man's name was so set, not as declaring that he held such rank, but as the measure of the allowance made to him. This is corroborated by the heading of the list, which is of claims allowed or disallowed, not of officers entitled, &c. The title follows each name instead of preceding it, and where no allowance is made, no title is given ; opposite the name stands the words "not allowed." If the omission of military title and the use of these words are not intended, and they certainly are not, to deny a military character to the person so marked, then the insertion of "Lt," &c., should not be construed to attribute a military character to the person so designated. Both are intended to refer solely to land, the one declaring that the person shall have none ; the other that he shall have a certain quantity. But see next page as to issue of warrants to the officers.

As the commissioners, in adjusting Bowman's claim for pay, gave him quartermaster's pay, though, in effect, declaring that he was not a quartermaster, so this board gave him a lieutenant's share of land, though he was not a lieutenant ; and, as a quartermaster was in rank a lieutenant, the board, who gave him lands, was very probably governed by the decision of the commissioners who fixed his pay.

The State of Virginia has been exceedingly liberal in granting

lands, and it is not shown how far the fact of having received bounty land has been received as evidence to prove actual commission and service.

II. If Bowman was a commissioned officer, did he fulfil the conditions of the act?

1st. Did he serve to the end of the war? The petitioner produces evidence to prove he was an officer, and then throws on the United States the onus of proving that he ceased to hold his commission. He assumes that Bowman served so long as he continued to hold his commission or office. It is, however, shown by the testimony that Bowman returned to Virginia about the 11th of October, 1780, (see his claim for pay,) retired to his home, and never joined the army again. That was not serving—it was absence without leave. It was his duty instantly, on his return, to rejoin his regiment, and, if too ill to continue with it, to show that fact and retire on sick leave. Some evidence is produced to show that he was unable to do duty. If he could make his way from New Orleans home, the presumption is that he could have reached his regiment, or, at least, he might have reported by letter. Officers are not permitted to judge for themselves as to their capacity for service. Superior authority sometimes compels them to choose between a return to duty and resignation. Bowman could not properly and fairly avoid investigation into his condition by remaining quietly at home during the remaining two years and a half of the war, when an arduous struggle was taking place on the soil of his own State.

2d. Did he become supernumerary? This is not alleged or shown. It is impliedly denied.

From a view of all the evidence, it seems probable that Bowman was an enlisted man in 1777; that in May, 1779, he was appointed a horse master under the regimental quartermaster, and aided in the duties of that department; that his duties were considered as important as those of a quartermaster having the rank of a lieutenant; that he was therefore allowed equal pay, and equal land, but that he was never commissioned, and never served as required by the resolution of May, 1779.

Should the service, however, be admitted, the claim cannot exceed the line pay of a lieutenant, exclusive of additional allowance for staff duty; and interest cannot be allowed. The act of 1832 makes the decisions of the courts of Virginia the guide in adjusting these claims, and those courts have not allowed staff pay to officers whose staff duties ceased before the termination of the service; nor have they allowed interest.

JNO. D. McPHERSON,
Deputy Solicitor Court of Claims.

ISAAC S. BOWMAN and GEORGE BRINKER, surviving executors of ISAAC BOWMAN, deceased, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

This claim was presented to the Treasury Department in 1834, and was rejected by the Secretary, Mr. Woodbury, on the ground that the evidence was not deemed sufficient in the absence of all record proof of the testator's services. In March, 1853, the case was submitted to Mr. Heath, the Commissioner of Pensions, and the claim was rejected. In September, 1853, the case was submitted to Mr. Waldo, the Commissioner of Pensions, and the claim was again rejected. In October, 1853, the decision of Commissioner Waldo was affirmed by the Secretary of the Interior, Mr. McClelland. A petition was afterwards presented to Congress in favor of the claim. On the 13th of February, 1854, the Senate Committee on Pensions made a favorable report, submitting the following resolution: "Resolved, that the claim of Isaac Bowman, legal representative of Isaac Bowman, deceased, for half-pay due his father under the act of the general assembly of Virginia of May, 1779, be referred to the Secretary of the Interior for liquidation under the act of Congress of July 5, 1832, and that the Committee on Pensions be discharged from the further consideration of the case." That resolution was adopted by the Senate. On the 16th of February, 1854, the House Committee on Revolutionary Claims reported favorably, submitting the following resolution: "Resolved, that the petition in the case of Isaac Bowman be referred to the Secretary of the Interior for liquidation under the act of July 5, 1832, and that the committee be discharged from its further consideration." And, in the next month, the House committee reported as before, and the resolution last above named was passed by the House. In consequence of those resolutions, the claim was again presented to the Secretary of the Interior, Mr. McClelland. The claimant contended that the resolutions required the Secretary to allow the claim, and relied on the opinion of a former Attorney General, in 1849, in the case of Churchill Gibbs.—(5 Att. Gen., 82.) The Secretary referred the question, in 1854, to the Attorney General then in office, who gave his opinion that the resolutions had not the effect of a law, but that it would be proper for the Secretary to re-examine the merits of the claim, (6 Att. Gen., 680,) in which opinion the Secretary concurred. The Secretary accordingly re-examined the merits, evidently with great care, and, in September, 1854, gave a lengthened written opinion adverse to the claim.

The case is now submitted to the consideration of this Court.

With respect to the effect of the separate resolutions of the two Houses of Congress, referring this claim to the Secretary of the Interior, in 1854, the opinions of the then Attorney General and Secretary are, in our opinion, correct. Those resolutions did not direct the Secretary to allow the claim, and if they had, they would not have been obligatory upon him. They justified him in re-examining the case, and that was all.

The petition states that Isaac Bowman, the testator, was a lieuten-

ant and quartermaster, also called horse master, in the Illinois regiment commanded by Colonel George Rogers Clark, in the war of the revolution; that whilst he, the testator, was in service in the line of his duty, and commanding a detachment of said regiment, the troops were attacked by the Indian allies of Great Britain, in which attack the testator was severely wounded and taken prisoner; that he was detained as a prisoner from November, 1779, till April, 1780, when he was sold by his captors to an Indian trader, by whom he was taken to New Orleans, and from there to Cuba, from whence, passing through Philadelphia, he returned to his home in Virginia; that he never resigned as lieutenant or quartermaster, otherwise called horse master; that he was never again ordered into service after his return from captivity; that he was never dismissed from the service; and that he died on the 9th of September, 1826. The petition therefore claims that the testator was entitled, under the laws of Virginia, to the half-pay of a lieutenant and quartermaster from the close of the revolutionary war until the time of his death; that the claimants, as his executors, are now entitled to receive the same from the United States, and that payment has been demanded at the proper department and refused.

This claim is founded on an act of the Virginia legislature of May, 1779, and an act of Congress of the 5th of July, 1832. The Virginia act is as follows: "All general officers of the army being citizens of this Commonwealth, and all field officers, captains and subalterns, commanding or who shall command in the battalions of this Commonwealth on continental establishment, or serving in the battalions raised for the immediate defence of this State, or for the defence of the United States, * * * * * provided Congress do not make some tantamount provision for them, who shall serve henceforward, or from the time of their being commissioned, until the end of the war; and all such officers who have or shall become supernumerary on the reduction of any of the said battalions, and shall again enter into the said service if required so to do, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half-pay during life, to commence from the determination of their command or service."—(10 Hen. Stat., 25.)

The act of Congress above referred to, so far as it need be stated, is as follows:

The first section provides for the payment by the United States to the State of Virginia the amount which said State had paid to the officers commanding in the Virginia line in the war of the revolution, on account of half-pay for life promised said officers by that State.

The second section provides for the payment by the United States to the State of Virginia the amount of the judgments which had been rendered against her on account of the promise contained in her said act of 1779, in favor of the officers or representatives of officers of the regiments and corps (among others) "of Colonels Clark and Crockett, and Captain Rogers' troop of cavalry, who were employed in the Illinois service."

The third section (the one immediately applicable to this case) provides that the Secretary of the Treasury (now the Secretary of the Interior) adjust and settle those claims for half-pay of the officers of

said regiments and corps, which had not been paid or prosecuted to judgments against the State of Virginia, and for which said State would be bound on the principles of the half-pay cases decided in the supreme court of appeals of said State.—(4 Stat. at Large, 563.)

The claimants, therefore, to sustain the present suit against the United States for the half-pay in question, must show that the testator might, in his lifetime, have recovered said half-pay from Virginia on the principles of the half-pay cases which had been there decided previously to said act of Congress.

The principles of those half-pay cases in Virginia, referred to in said act of Congress, and upon which the case now before us depends, were fully discussed and settled in 1830, in the Virginia court of appeals, in Markham's case, 1 Leigh's Rep., 516 to 524, and Lilly's case, same volume, 525 to 565. Those principles are, that the officer for whose life the half-pay is claimed must have served in the revolutionary war and in the Virginia State line from the time said act of 1779 was passed, or from the time of his being commissioned, until the end of the war, or until he became a supernumerary.

The material evidence in the case is as follows :

A. A certificate by John Douthitt, clerk of the board of commissioners of the Illinois grant, dated the 29th of August, 1834. This certificate states that it appears from the books and papers in the office that Isaac Bowman served in said Illinois regiment as a lieutenant, and that he was allowed 2,156 acres of land in said Illinois grant, to wit, lots Nos. 1, 158, 213, 289—five hundred acres each, and 156 acres in No. 32.

B. An ex parte affidavit of Samuel Kerchival, dated the 8th of August, 1834. The affiant states that he became acquainted with Captain Isaac Bowman, of Shenandoah county, Virginia, about the year 1784, and continued afterwards intimately acquainted with him until his death, on the 9th of September, 1826; that said Bowman was known through life as an officer of the Illinois regiment of the army of the revolution; that he repeatedly stated to the affiant that, late in the fall of 1779, while coming from Kaskaskia (as affiant understood on furlough) to the Falls of Ohio, they (the party) were attacked by the Indians, when all but himself were killed, or never afterwards heard of; that he was wounded in five places, the scars of which the affiant had often seen, and was taken prisoner; that he was afterwards purchased by an Indian trader and taken to Natchez, from whence he went to New Orleans, and the Havana, on the island of Cuba, and then obtained a passage to Philadelphia, and returned to his home; that he was long a cripple, so unable to have joined his regiment or performed military duty, probably for a year or two, and that he said he lost his commission and papers when taken prisoner.

C. An ex parte affidavit of David Stickley, dated the 8th of August, 1834. The affiant says that he was intimately acquainted for about forty years with Captain Isaac Bowman, of said county, (Shenandoah, Virginia,) deceased; that said deceased, during that time, was

known and reputed to have been an officer in the Illinois regiment of the war of the revolution, and to have been wounded and taken prisoner by the Indians, and kept in captivity for some time; that affiant had often heard the history of the same from Captain Bowman himself, who said that, in ascending the Ohio river, he was attacked by the Indians, and (the party with him) nearly all killed; that he himself was wounded in several places, and taken prisoner, and retained some time in captivity, when he was purchaseed by an Indian trader and taken to Natchez, from whence he went to New Orleans and the island of Cuba; that having obtained a passage for Philadelphia, he returned to his residence, adjoining the affiant's, where the affiant believes said Bowman was born, and where he died about the 9th of September, 1824. From common report, and Captain Bowman's known character for truth, and his frequent recurrence to the said transactions, the affiant says he is as fully convinced of the reality of Bowman's service and captivity as he could possibly be of anything which he did not see.

D. An ex parte affidavit of Colonel Abraham Bowman, a revolutionary officer, dated the 23d of June, 1832. The affiant says that his brother, Isaac Bowman, a lieutenant in the Illinois regiment of the Virginia State line of the army of the revolution, was taken prisoner, as he has been informed by his said brother, and believes, on the Ohio river, about forty miles above the mouth, in November, 1779, being then, at the time of his capture, a lieutenant of said regiment, and having been in service from the spring of 1777; that he was with the Indians as a prisoner until April, 1780, and was then purchased by a man named Turnbull, and went to New Orleans, thence to Cuba, and thence to Philadelphia, which the affiant thinks was in the fall of 1781.

E. An ex parte affidavit of Colonel Anthony Crockett, of the army of the revolution, dated September 4, 1832. The affiant says that Isaac Bowman was a lieutenant of the Illinois regiment in the fall of 1779, at Vincennes; that the affiant, at that time, was returning into Virginia, and knows not how long Bowman continued in service.

F. A statement of George M. Bibb, saying that he was well acquainted with Anthony Crockett, who, by reputation and the public records, was an officer in Colonel George R. Clark's regiment, called the Illinois regiment; that he was a man of integrity, and entitled to full credit; that he, Bibb, also knew Colonel Bowman, who was a man of high character, and to whose statements full credit is due. And a statement of James Guthrie, saying that he knew said Crockett, and knows all that the Hon. George M. Bibb has said of him; and that he knew Colonel Bowman by character, which was unquestionably good.

G. An ex parte affidavit of Archibald Lovelace, dated 12th of April, 1852. The affiant says that he was acquainted with Daniel Orear, of Fauquier county, Virginia, who was a soldier in the Illinois regiment in the war of the revolution; that he heard Orear say, when speaking of his revolutionary services, that he was a part of his time under Lieutenant Isaac Bowman, of the Illinois regiment, who was a valuable officer,

and who, whilst serving as first lieutenant in said regiment, was taken prisoner on or near the Ohio river, and kept as such a considerable time; that Orear further said that Lieutenant Bowman lived and died in Shenandoah county, Virginia, leaving an honorable and intelligent family. The affiant says that Orear made said statement, in substance, more than once, and that he was a man of strict integrity, and is now dead, as the affiant is informed.

H. This paper contains a copy from the auditor's office of Virginia of an account against that State, presented by Isaac Bowman in June, 1783, as follows:

"1779, May 12. The State of Virginia, Dr. to Isaac Bowman.

"To my services as horse master in the Illinois regiment until I was defeated by the Indians, which was 17th day of November, and then until October the 11th, 1780, before I got home, which is sixteen months and twenty-nine days."

There is also from said office the following copy of a certificate as to the above account:

"24th June, 1783. I certify that Mr. Isaac Bowman was appointed horse master in the year 1779 in the Illinois department, but how long he continued I know not.

"G. R. CLARK."

The following, from said office, is a copy of the decision on said account, made by the Virginia commissioners for settling western claims:

"The commissioners are of opinion that Mr. Isaac Bowman ought to be allowed for his services as horse master, from the 12th of May, 1779, until the 17th of November, 200 days, at $\frac{6}{4}$ per day, amounting to £63 6s. 8d.—equal to a quartermaster's pay. They are further of opinion that he was out of the service of this State at the time he was captured, and consequently has no legal claim for the time he remained in captivity, but beg leave to refer it to the consideration of the honorable the executive."

The said paper (H) also contains, from said office, copies of two receipts given to Isaac Bowman at Fort Clark in June, 1779: one by one Montrey for \$18, for taking up and securing three horses belonging to the State of Virginia; the other by one Piangraf for \$12, for four men taking care of the State horses six days.

I. Copies of other papers from said office, to wit: a letter to the governor of Virginia from John Todd, who was lieutenant of Illinois county, dated Richmond, 2d of June, 1780. The following is an extract from that letter: "Mr. Isaac Bowman, with seven or eight men and one family, set off from Kaskaskia the 15th of November last, in a bateau, attended by another bateau with twelve men and three or four families in it, bound to the Falls of Ohio. I judged it safer to send to the Falls many articles belonging to the Commonwealth by Bowman than to bring them myself by land. Bowman's bateau fell into the hands of the Chickasaw Indians, and the other arrived in

March or April at the French Lick on Cumberland, with the account that Bowman and all the men, except one Riddle, were killed and taken. I enclose your excellency a list of such articles as belonged to the State, as well as I can make them out from my detached memorandums, my books and many necessary papers being also lost."

An order for raising troops, headed "by George Rogers Clark, esq., colonel of the Illinois battalion, commander-in-chief of the Virginia forces in the western department, &c., &c., &c.," dated headquarters, Falls of Ohio, 30th of September, 1779.

"A provision return of the troops at Fort Clark, under the command of Colonel George Rogers Clark, commencing the 10th and ending the 12th of May, both days included, 1779," signed "James Robertson, quartermaster; G. R. Clark."

"An account of public horses purchased and delivered in the western and Illinois department under the direction of William Shannon, quartermaster general, &c." Among other entries in this account is the following: "1779, June 14. Delivered to Captain Bowman, horse master, as per receipt, 38 horses."

"FORT PATRICK HENRY, *July* 10, 1779.

"SIR: Please to deliver to Isaac Bowman all the goods remaining of the plunder taken at this post, with an inventory of the same; and your compliance will oblige your humble servant,

"JOS. BOWMAN.

"The QUARTERMASTER."

"Inventory of sundry stores delivered to Isaac Bowman by order of the major at Fort Patrick Henry, July 10, 1779." Here follows various items, such as blankets, &c.

K. Extracts from a small book in said office, on the first page of which book is written "plunder store account; Mr. Isaac Bowman, quartermaster, accounts." Copies of accounts in said book against several persons are given, one of which is as follows:

"Dr. Isaac.

Cr. Bowman.

"May 21. To 8 yards of," &c. The aforesaid auditor states that the upper corners of the greater part of said book is illegible, but when legible, it is invariably headed 1779. He also states "that so far as it had been practicable to search the mass of papers connected with the Illinois expedition, no evidence of a resignation by Isaac Bowman had been discovered."

L. A certificate, as follows:

"This is to certify that there is on file in this office, in the second volume of Illinois papers, an account headed thus: 'An account of quartermaster's stores, &c., issued in the Illinois and its dependencies, commencing the 1st day of June, 1779, by John Reid, quartermaster of the Illinois regiment, viz:' which is very lengthy; the first entry therein dated June 1, 1779, and the last on October 11, 1779, and is dated Falls of Ohio, October 31, 1779, and signed John Reid,

quartermaster Illinois regiment, and verified by G. R. Clark, November 4, 1779.

Given under my hand, in the office of the auditor of public accounts, Richmond, Virginia, this 15th of March, 1853.

RO. JOHNSTON,
Auditor of Public Accounts.”

M. A letter from the secretary of State of Virginia, dated Richmond, May 19, 1853. He states that he could not find any record that commissions did issue or not to the officers on the Illinois frontier, designating the names of those officers; but that instructions were given to Colonel Clark to take the command of five other companies raised under the act of assembly, which, if completed, would have orders to join him, and to the lieutenant colonel, with blank commissions for the officers of five companies to be filled up, &c., and that those instructions, as well as those to John Todd, who was appointed county lieutenant or commandant of the county of Illinois, are stated on the journal of the 12th of December, 1778, to have been issued by the governor.

N. Copy of the proceedings of the commissioners for adjusting the claims of the officers and soldiers of the Illinois regiment to the lands given them under a resolution of the general assembly of Virginia, of January 2, 1781, agreeably to an act of assembly of that State, passed October session, 1783.

The board met at Louisville on the 2d of August, 1784, Colonel Clark being one of the members present; and on the next day the following resolution was adopted:

“That all officers and soldiers who marched and continued in service till the reduction of the British posts on the northwest side of the Ohio; that all who engaged and enlisted in the Illinois regiment afterwards, and served during the war, or three years, are entitled to a share of the grant under the resolution and act of assembly; that all those soldiers who have enlisted in said regiment since the second day of January for three years, or during the war, are not entitled, as there seems to be no provision made under the resolution for those who should thereafter be incorporated in the said regiment; that the officers of the regiment are entitled to a share of the land in proportion to the commission they respectively held on the 2d day of January, 1781, and not in proportion to the commission they have since held in consequence of promotions, and that, therefore, officers commissioned since that period are not entitled at all; and that those soldiers who enlisted to serve twelve months after their arrival at Kaskaskias, agreeable to an act of assembly of the fall session, 1778, for the protection and defence of the Illinois county, who did not re-enlist in the regiment, are not included in said resolution; that those officers who were commissioned under said act, and resigned before the expiration of the twelve months, are not entitled; last, that those who continued during the year, and then retired, not having a command, are entitled.”

The board met on the fourth of August. The same members were present as on the third.

The claims of many persons were presented, and the most of them were allowed. The name "Isaac Bowman, lieutenant," is on the list of the applicants whose claims were allowed. By an order of the board, a subaltern officer was entitled to two thousand acres of land. The board met on the 8th April, 1788, Colonel Clark being one of the members present, when a deed was executed to Isaac Bowman for his four surveys of five hundred acres each.

O. Extracts from a journal of the Western Commission, which journal is on file in the auditor's office at Richmond, Virginia, as follows: January 1, 1783. "The papers of Major Joseph Bowman, deceased, and Captain Isaac Bowman, were laid before the board, which were examined, and finding them necessary for the settlement of other accounts, take them with them to the Falls of Ohio." March 22, 1783. "An account of Captain Isaac Ruddle was laid before the board for his company and rations when the Illinois country was taken by Colonel Clark. The money has been drawn by Colonel Montgomery at the treasury, and carried by him to Kaskaskias, from whence he sent it by Isaac Bowman on from thence to be delivered to Isaac Ruddle; and on the passage, Isaac Bowman being taken by Indians, and his papers destroyed, yet saved the money, and after he was at liberty gave it to Mr. Pollock; for this reason, and as part of it seems to be a private account, the commissioners could not settle it." These extracts also show an allowance by the commissioners on the 25th June, 1783, of Mr. Isaac Bowman's account of his services as horse master to the Illinois regiment as noticed in the aforesaid paper marked H. They also refer to Romney and Winchester pay rolls, noticed in the next paper.

P. Extracts from a book in said auditor's office, endorsed "Romney & Winchester's Copy Pay Rolls," showing that Isaac Bowman was an ensign, in 1775, in Captain Joseph Bowman's company of Virginia militia.

The foregoing is, in substance, the evidence on which the claimants rely.

The first question is, was the testator a lieutenant or quartermaster at any time in the Virginia troops under Colonel Clark in the revolutionary war?

It is certainly not proved that he was a quartermaster. The meaning of the paper marked K is too obscure to have any weight; whilst the papers marked I and L contain evidence against the idea of his being such officer. Indeed, his account, in paper marked H, against the State, presented by himself in 1783, was for his services as horse master (not quartermaster) in the Illinois regiment; and for part of the time charged he was paid six shillings and four pence per day, "equal to a quartermaster's pay." He was, no doubt, as Colonel Clark certifies, a horse master for a while in 1779 in the Illinois department, but such an employment, and a per diem payment for the service, are no evidence whatever that he was a quartermaster.

It may be considered, from the evidence, that the testator was a

lieutenant in the troops under Colonel Clark, in the summer of 1778. The general assembly of Virginia, on the 2d of January, 1781, resolved: "As Colonel George Rogers Clark planned and executed the secret expedition by which the British posts were reduced, and was promised, if the enterprise succeeded, a liberal gratuity in lands in that country for the officers and soldiers who first marched thither with him, that a quantity of land, not exceeding 150,000 acres, be allowed and granted to the said officers and soldiers, and the other officers and soldiers that have been since incorporated into the said regiment, to be laid off," &c.—(10 Hen. Stat., 565.) In 1783 a board of commissioners was appointed to settle and determine the claims to land under said resolution.—(11 Hen. Stat., 335.) That board, at its session at Louisville in 1784, recognized the testator as a lieutenant, and allowed him a lieutenant's share in said grant of land. It seems proper, therefore, that we should view him as such officer for the time required to entitle him to such share in the grant. The same board, at its session in August, 1784, stated, in accordance with said resolution of 1781, that all officers and soldiers who marched and continued in service till the reduction of the British posts aforesaid were entitled to a share of the grant. The said allowance of the commissioners, therefore, goes no further than to show that the testator was a lieutenant in said service until the reduction of those posts. Nor is there any other evidence, in our opinion, sufficient to show that he was such officer, at a subsequent period, in the Illinois regiment. The certificate of Douthitt amounts to no more than what is shown by the action of said board of commissioners at Louisville; and the ex parte affidavits of Kerchival, Stickley, and Lovelace are only as to rumors and matters of hearsay. The ex parte affidavits of Colonels Bowman and Crockett of the testator's being a lieutenant in said regiment in the fall of 1779, are insufficient, when viewed in connexion with the other evidence in the case, to establish the fact to which they relate. They are only parol evidence, and are liable to the objections to which, in such cases, such evidence is subject. They were made more than fifty years after the time they allude to, and do not state in what manner the affiants' knowledge was obtained.

The next question is, whether the testator's being a lieutenant in said troops when they captured the western posts, shows him to have been a lieutenant in the Illinois regiment referred to in the aforesaid act of Congress of 1832? And we think that it does not. The officers thus alluded to by said act of Congress were of the class of those to whom Virginia⁷ had conditionally promised half-pay by the aforesaid act of 1779; but that Virginia act only applies to officers of the regular line who were in service when that act passed, or were commissioned afterwards. The troops which marched against the western posts were not of the regular line. They were militia, raised by the mere order of the governor of Virginia, without legislative authority, and for a temporary purpose. Their term of service expired when the posts were reduced. The times of the reduction were as follows: Kaskaskias on the 4th of July, 1778; Cahokia a day or two afterwards. The inhabitants of St. Vincent's took the oath of allegiance to Vir-

ginia about the middle of July, 1778, through the influence of Mr. Gibault, under the instructions of Colonel Clark; and about the middle of August following Captain Helm, by order of Colonel Clark, took command at that place. So that said posts were reduced about nine months before the passage of the Virginia act of 1779. On the 15th of December, 1778, Mr. Hamilton, a British governor from Detroit, retook St. Vincent's, but Colonel Clark, with one hundred and seventy men, raised at or near Kaskaskias without authority, (the term of the Virginia militia having expired,) marched from Kaskaskias and captured St. Vincent's on the 24th of February, 1779, which was between two and three months before said act of 1779 was passed.—(Clark's Journal, in Dillon's History of Indiana, 1 vol., 132 to 173.) Indeed, the said Illinois regiment was not in existence when the western posts were reduced as aforesaid. It was raised afterwards, by an act of the Virginia legislature, for the avowed purpose of protecting the inhabitants of the country in which those previously conquered posts were situated. This appears by the following extract, under date of November, 1778, from Marshall's Life of Washington: "While the frontiers of New York and Pennsylvania were thus suffering the calamities incident to savage warfare, a fate equally severe seems to have been destined for Virginia. The western militia of that State had made some successful incursions into the country northwest of the Ohio, and had taken some British posts on the Mississippi. These, by an act of the legislature, were erected into a county called the county of Illinois, and a regiment of infantry, with a troop of cavalry, to be commanded by Colonel George Rogers Clark, * * * were ordered to be recruited for its protection. This corps was divided into several detachments, the principal of which remained with Colonel Clark at Kaskaskias."—(3 Marshall's Life of Washington, 565.) That regiment continued in service until the end of the war. It is plain, therefore, that we cannot infer that the testator was an officer in the Illinois regiment referred to in said act of Congress, merely because he was an officer in the militia force that conquered the western posts. That the force that made those conquests was composed of militia is expressly stated in the preamble to the Virginia act for establishing the county of Illinois.—(9 Hen. Stat., 552.)

The last question is, even supposing the testator to have been a lieutenant or quartermaster in said regiment when said act of 1779 passed, did he serve till the end of the war or become a supernumerary?

We think it is quite certain that the testator did not serve until the end of the war. After his release from captivity, instead of going to his regiment, he went home in October, 1780, and there, so far as we are informed, he remained till the war ended. If, after his release, he joined the regiment and continued in service whilst the war continued, the burden of proof of those facts was on the claimants; but they have furnished no such proof. Besides, the testator's name not being on the list of those entitled to half-pay, as reported by the board of officers hereinafter particularly noticed, is very strong evidence that he did not serve till the end of the war.

With respect to his becoming a supernumerary, the facts are as follows: On the fifteenth of November, 1779, he, with seven or eight men and one family, set off from Kaskaskias in a bateau for the Falls of Ohio. On the seventeenth of the same month they were attacked on the Ohio river by the Indians, when the testator was severely wounded and taken prisoner. He was afterwards purchased from the Indians by a trader, and got to his home as aforesaid. That is the last we hear of him until in June, 1783, when he presented his account against the State of Virginia for services as horse master in the Illinois regiment, from the twelfth of May, 1779, till his defeat by the Indians on the seventeenth of November, and then till the eleventh of October, 1780, before he got home. There is nothing in those facts to show that the testator was a supernumerary officer. The Virginia act of 1779, in speaking of the officers entitled to half-pay; says: "And all such officers who have or shall become supernumerary, on the reduction of any of the said battalions, and shall again enter into the said service if required so to do," &c. If the testator, therefore, became such supernumerary officer, it was because the number of privates in said regiment had been so reduced as to occasion a surplus of officers, and he had been dismissed from active service by the proper authority as such an officer. In the Virginia court of appeals one of the judges, in commenting on the statutory provision now before us, says: "What is a supernumerary? He is just as much an officer as any other; but his battalion or corps has been reduced or disbanded, or so arranged in some way as to leave him for the present no command, and the State, to save the expense of full pay and subsistence, discharges him from actual service."—(Lilly's case, 1 Leigh's Rep., 529.) Now, nothing can be clearer than that the testator was not within this definition of a supernumerary officer. About the time of his release by the Indians and his return home, Virginia had great cause for increasing her military force on her western frontier, and was making great exertions to do so. In October, 1780, (the month in which the testator got home,) the legislature passed the following act: "And for defence of the western frontier against the invasions of the Indian or British enemy, Be it enacted, that the governor, with advice of council, shall have full and ample power to cause to be recruited and fully completed, upon the best terms possible, the regiment under Colonel George Rogers Clark's command, and that they be allowed the same pay and rations with other officers and privates on continental establishment, and be ordered into service whenever the governor, with advice of council, shall think proper." (10 Hen. Stat., 389.) This regiment, therefore, was not then to be reduced, but, on the contrary, it was to be recruited and fully completed upon the best terms possible. There is no evidence that there were too many officers in the regiment, and that the testator was dismissed from active service as a supernumerary officer. Nor does it appear from any source, not even from his own narratives of the affair to Kerchival or Stickney, that he at any time after his release from captivity joined the regiment or offered to do so, or even gave notice of his release. The suit must therefore fail for the reason,

were there no other, that it is not proved that the testator served to the end of the war or became a supernumerary.

The following facts connected with the cause tend strongly to show that there is no foundation for this claim:

1. The revolutionary war ended in 1783, and in 1784 the half-pay for the first year became due for those entitled to it, and the same continued to fall due at the end of each subsequent year during the officer's life. Now, the testator resided in Virginia in 1784, and continued to reside there for more than forty years afterwards, yet he does not appear to have ever claimed any such payments. That he was ready to claim anything from the State to which he supposed himself entitled is evident from his claim, before noticed, for his services as horse master, which he made at Richmond in 1783.

2. If he was entitled to half-pay, he was also entitled, under a general law of Virginia, to bounty land, to wit, to 2,000 acres; which quantity was afterwards considerably increased.—(10 Hen. Stat., 160, 375.) Yet there is no evidence that the testator ever received or applied for the bounty provided for by those statutes.

3. The testator's name is not found on any of the muster or pay rolls extant of the Illinois regiment. The Commissioner of Pensions, Mr. J. E. Heath, in a letter of the seventeenth of March, 1853, says: "There are on file in this office copies procured from Virginia of various muster and pay rolls, and other records of the service of officers of the Illinois regiment, but nowhere does the name of Isaac Bowman, as lieutenant, appear. This circumstance, coupled with the fact that quite as many officers have received half-pay for service in that regiment as ever belonged to it, raises at least a reasonable presumption against the present claim." Mr. J. F. Adams, an examiner in the Pension Office, in a communication of the ninth of August, 1853, to the Commissioner, says: "I have carefully read over all the rolls of the Illinois regiment as it was before November, 1779; Bowman's name does not occur on any pay roll or muster roll of *that period, when, it is said, he was a lieutenant*. I only find it in one list; it is that of the adjusting board of 1784."

That list of the adjusting board of 1784 is a list of those who claimed shares in the special grant of 150,000 acres of land, and does not, as before shown, affect this case.

4. In November, 1781, the Virginia legislature passed an act as follows: "And whereas, by the reduction of the battalions and corps in the State service, a considerable number of officers have become supernumerary, Be it enacted, that a return of all the State officers shall be made to the next assembly, wherein the corps, the rank of each officer, the date of his commission, the number of men at first raised in each corps, number of men when reduced, and time when reduced, shall be particularly specified by the executive; and the executive are hereby empowered and required to set on foot proper inquiries to discriminate such officers as by unworthy conduct, or by any means whatever, be thought unfit to be considered as entitled to half-pay."—(10 Hen. Stat., 466.) Afterwards a list of officers, as required by said act, was made out by a board of officers who sat at

Richmond in February, 1782; which list purports to contain the names of the officers of the Illinois regiment entitled to half-pay. That list, though not the exclusive test as to the officers entitled, is very high authority. It is spoken of by a judge of the Virginia court of appeals, as follows: "In consequence of this law, [said act of 1781,] a board was formed who reported to the executive a list of the officers as entitled to half-pay, and the executive approved of it, and sent it to the auditors for their guide in issuing warrants." (Lilly's case, 1 Leigh's Rep., 534.) We have examined that list, which is now before us, and find that Isaac Bowman's name is not on it.—(See list in Report No. 191, House of Rep., 22d Congress, 1st session.

We here close the examination of this case. Our opinion is, that Isaac Bowman, the testator, never had any right against the State of Virginia for the half-pay described in the petition; and that the present claimants, as his executors, have not now any right to such half-pay against the United States.

JAMES H. MCGILLON, DECEASED, BY HIS EXECUTOR,
JAMES H. MCGILLON, JR., PLAINTIFF,
VERSUS
THE UNITED STATES DEPARTMENT OF JUSTICE,
DEFENDANT.

Comes now the said Plaintiff and moves the Court for an order
that the said Defendant be required to pay to the said Plaintiff
the sum of \$10,000, with interest thereon from the date of
the death of the said James H. McGillon, to the date of
payment thereof.

The said Plaintiff respectfully requests the Court to grant
the said order, and to award to the said Plaintiff the costs
of this proceeding.

THE UNITED STATES

1. The petition of the said Plaintiff was filed in the
Court on the 10th day of January, 1900, and the said
Plaintiff moved the Court for an order that the said
Defendant be required to pay to the said Plaintiff the
sum of \$10,000, with interest thereon from the date of
the death of the said James H. McGillon, to the date of
payment thereof.

2. The said Plaintiff respectfully requests the Court to
grant the said order, and to award to the said Plaintiff
the costs of this proceeding.

3. The said Plaintiff respectfully requests the Court to
grant the said order, and to award to the said Plaintiff
the costs of this proceeding.

4. The said Plaintiff respectfully requests the Court to
grant the said order, and to award to the said Plaintiff
the costs of this proceeding.

5. The said Plaintiff respectfully requests the Court to
grant the said order, and to award to the said Plaintiff
the costs of this proceeding.

Respectfully submitted,
JAMES H. MCGILLON, JR.,
EXECUTOR OF JAMES H. MCGILLON, DECEASED.

James H. Moulton, Esq.,
Attorney at Law,
New York City.

Dear Sir:
I have the honor to acknowledge the receipt of your letter of the 10th inst., in relation to the above matter.

I am sorry to hear that you are unable to attend to the matter personally.

I will, however, endeavor to do all in my power to assist you.

I am, Sir, very respectfully,
Your obedient servant,

James H. Moulton, Esq.

Enclosed for you are the following documents:

1. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

2. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

3. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

4. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

5. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

6. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

7. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

8. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

I am, Sir, very respectfully,
Your obedient servant,

James H. Moulton, Esq.

Enclosed for you are the following documents:

1. A copy of the report of the Committee on the subject of the proposed amendment to the Constitution of the State of New York.

JAMES H. McCULLOH—HEIR-AT-LAW AND EXECUTOR OF.

JANUARY 18, 1859.—Reported from the Court of Claims, and committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JAMES H. McCULLOH, EXECUTOR OF JAMES H. McCULLOH

vs.

THE UNITED STATES.

1. The petition of the claimant, and amended petition, with certificate of letters of administration to the claimant.

2. Certified copy of docket entries in the district court for the district of Maryland of the cases in which forfeitures were claimed, and also copies of the information in the same cases, numbered from 1 to 9, transmitted to the House of Representatives.

3. Certified copies of releases by the Secretary of the Treasury of goods whereon forfeitures were claimed, transmitted to the House of Representatives.

4. Statements No. 1 and 2 received from the Treasury Department, transmitted to the House of Representatives.

5. Claimant's brief, supplemental brief, and references to documentary evidence.

6. United States Solicitor's brief.

7. Opinions of Judges Blackford and Loring adverse to the claim.

8. Judge Scarburgh's dissenting opinion.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said Court, at Washington, this seventeenth day of
January, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Court of Claims:

The petition of James H. McCulloh, of the city of Baltimore, in the State of Maryland, heir-at-law and executor of James H. McCulloh, late of said city, deceased, respectfully represents unto this honorable Court, that the petitioner's testator was, during the year 1808, and from thence up to the time of his death in 1836, collector of the customs for the district and port of Baltimore, aforesaid, and as such was entitled to all the privileges, incidents, and emoluments appertaining to said office.

That under the provisions of the 91st section of an act of Congress entitled "*An act to regulate the duties on imports and tonnage,*" passed 2d March, 1799, (Stats. at Large, L. and B., vol. 1, p. 697,) the said James H. McCulloh, collector as aforesaid, was, with the surveyor and naval officer of said port, entitled, in equal proportions, to one moiety of certain fines, penalties, and forfeitures which were, during his term of office, incurred at said port.

That on or about the third day of October, eighteen hundred and twelve, the said James H. McCulloh, acting in his capacity of collector as aforesaid, at the said port of Baltimore seized to the use of the United States, as forfeited, nine hundred and sixty-five packages of merchandise, then laden on board a certain ship or vessel called the "*Concordia,*" of Marblehead, whereof one Atkins Adams was then master, for the violation of the 4th section of the act of Congress passed the 1st March, 1809, entitled "*An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,*" (Stats. at Large, L. and B., vol. 2, p. 529,) as re-enacted and continued in force by the 3d section of the act of the 2d March, 1811, entitled "*An act supplementary to the act entitled 'An act concerning the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes.'*"—(Stat. at Large, vol. 2, p. 651.)

Your petitioner further shows, that by the 18th section of the above mentioned act of the 1st of March, 1809, as re-enacted and continued in force by the 3d section of the said act of 2d March, 1811, the forfeitures which were incurred under the said act of March 1, 1811, were collectable and distributable in the manner provided by the said act of the 2d March, 1799, and might be mitigated or remitted under the act of the 3d March, 1797, entitled "*An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned.*"—(Stat. at Large, vol. 1, p. 506.)

That on or about the 7th day of October, 1812, information was filed against said merchandise in the district court of the United States for the district of Maryland, and the necessary proceedings taken to enforce the said forfeiture. That the claimants of said merchandise appeared and filed their answers and prayed that said merchandise should be delivered to them; whereupon the said court caused the said merchandise to be appraised, and the same delivered

to the respective claimants, who executed their bonds, with security to the satisfaction of the court, for the appraised value of said merchandise, they having previously secured the payment of the duties on said merchandise in like manner as if the same had been legally entered.

That the duty bonds so delivered by the said claimants of said merchandise, with the sum of \$127 14, which was paid in cash, amounted to the sum of *eighty-three thousand six hundred and twenty-six dollars and ninety-five cents*, being the amount of duties which would have accrued upon said merchandise if the same had been lawfully imported.

That subsequent to the institution of said proceedings against the said merchandise, the owners, or persons interested therein, petitioned the judge of the United States district court for the district of Maryland, praying that the said forfeitures incurred by them as aforesaid might be mitigated or remitted. And the said judge having caused the said petitions, with certain statements of facts, to be transmitted to the Hon. Secretary of the Treasury of the United States, in accordance with the 1st section of the said act of the 3d of March, 1797, the said Secretary of the Treasury did, by sundry acts of remission, in accordance with the act of Congress of the 2d of January, 1813, entitled "*An act directing the Secretary of the Treasury to remit fines, penalties, and forfeitures in certain cases*," (Stat. at Large, L. and B., vol. 2, p. 789,) remit to the said petitioners all the fines, penalties, and forfeitures which they had incurred as aforesaid, upon the costs and charges that had arisen or might thereafter arise being paid, and on payment of the *duties* which would have been payable by law on the said goods and merchandise if legally imported, and did also direct the prosecutions which had been instituted to cease and be discontinued on the payment of the costs, charges, and duties as aforesaid.

Your petitioner further shows, that the said acts of remission were granted by the Secretary of the Treasury before the said merchandise was decreed or adjudged by the said court to be forfeited, and that in consequence of said acts of remission no such decree or judgment was ever made against the said merchandise by the said court. That in accordance with said acts of remission the said petitioners paid the costs and charges attending the proceedings which had been instituted, and also paid and discharged the bonds which had been given as for the duties on said merchandise. That the amount paid as for duties upon the said merchandise, in accordance with the conditions upon which said remissions were made, was the sum of *eighty-three thousand six hundred and twenty-six dollars and ninety-five cents*, (\$83,626 95.)

That the said sum of money so paid was, by the said James H. McCulloh, collector as aforesaid, in accordance with the then settled practice of the Treasury Department, accounted for and wholly paid into the treasury of the United States, in the same manner as lawful duties were accounted for and paid.

That James H. McCulloh, collector as aforesaid, departed this life on or about the tenth day of November, 1836, and that your petitioner soon afterwards qualified as his executor. And, in view of the facts herein set forth, your petitioner claims that under the provisions of

the said 91st section of the act of March 2, 1799, the said James H. McCulloh, collector as aforesaid, was in his lifetime justly and lawfully entitled, and your petitioner, his executor, is now entitled to one-sixth of the said sum of eighty-three thousand six hundred and twenty-six dollars and ninety-five cents, so received by the United States as aforesaid, which said one-sixth amounts to the sum of *thirteen thousand nine hundred and thirty-seven dollars and sixty-five cents*, (\$13,937 65.)

Nevertheless, the United States did not, in the lifetime of the said James H. McCulloh, collector as aforesaid, pay to him the said sum of thirteen thousand nine hundred and thirty-seven dollars and sixty-five cents, or any part thereof, nor to your petitioner since his death; but continue to hold the same contrary to the rights of your petitioner, who avers that, so far as he is informed or believes, no action upon the said claim has ever been had in Congress, or by any of the departments of the government.

Your petitioner is solely interested in said claim, as executor and as sole devisee of the said James H. McCulloh, deceased.

J. H. McCULLOH,

Executor of James H. McCulloh.

BRENT & KINZER, *Attorneys.*

To the honorable Court of Claims:

The amended petition of James H. McCulloh, of the city of Baltimore, in the State of Maryland, heir-at-law and executor of James H. McCulloh, late of said city, deceased, respectfully represents:

That your petitioner's testator was, during the year 1808, and from thence up to the time of his death in 1836, collector of the customs for the district and port of Baltimore aforesaid, and as such was entitled to all the privileges, incidents, and emoluments appertaining to said office.

That under the provisions of the ninety-first section of an act of Congress entitled "*An act to regulate the duties on imports and tonnage*," passed March 2, 1799, (Stats. at Large, L. and B., vol. 1, p. 697,) the said James H. McCulloh, collector as aforesaid, was, with the surveyor and naval officer of said port, entitled, in equal proportions, to one moiety of certain fines, penalties, and forfeitures which were, during his term of office, incurred at said port.

That between the 1st day of August and the 31st day of December, 1812, the said James H. McCulloh, acting in his capacity as collector as aforesaid, seized to the use of the United States, as forfeited, a large quantity of merchandise, laden on board of, and which had been imported into the port of Baltimore in the following named ships and vessels, viz: ship Marcellus, W. Ward master, entered 18th of September, 1812; brig Penobscot, J. Perkins master, entered 18th of September, 1812; ship Nancy, J. Chote master, entered 9th of October, 1812; ship Concordia, A. Adams master, entered 7th of October, 1812; ship Minerva, J. Gross master, entered 18th of September, 1812; brig Female, C. Childs master, entered 23d of October, 1812; ship

Frederick, G. King master, entered 24th of October, 1812; ship Merimac, C. Cook master, entered 4th November, 1812; and brig Ann, J. Page master, entered 4th November, 1812. That the said seizures were made of said merchandise for the violation of the fourth section of the act of Congress passed 1st March, 1809, entitled "*An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,*" (2 Stats. at Large, L. and B., p. 529,) as re-enacted and continued in force by the third section of the act of 2d March, 1811, entitled "*An act supplementary to the act entitled 'An act concerning the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes.'*"—2 Stats. at Large, p. 651.)

Your petitioner further shows, that by the eighteenth section of the above mentioned act of the 1st March, 1809, as re-enacted and continued in force by the third section of the said act of the 2d March, 1811, the forfeitures which were incurred under the said act of the 2d March, 1811, were collectable and distributable in the manner provided by the act of the 2d March, 1799, above mentioned, and might be remitted or mitigated under the act of the 3d March, 1797, entitled "*An act to provide for the mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned.*"—(1 Statutes at Large, p. 506.)

That informations were filed against the said merchandise in the district court of the United States for the district of Maryland, and the necessary proceedings taken to enforce the said forfeitures.

That the claimants of said merchandise appeared and filed their answers, and prayed that said merchandise should be delivered to them; whereupon the said court caused the said merchandise to be appraised, and the same delivered to the respective claimants, who executed their bonds, with security to the satisfaction of the court, for the appraised value of said merchandise, they having previously executed their duty bonds at the custom-house at Baltimore in the same manner as if the said merchandise had been lawfully imported. That the duty bonds so delivered by the said claimants, and the cash paid as for duties, amounted to a large sum of money, to wit: the sum of four hundred and eighty-six thousand six hundred and forty-nine dollars and eighty cents, being the amount of duties which would have accrued and been payable on said merchandise if the same had been lawfully imported.

That subsequent to the institution of said proceedings against the said merchandise, the owners, or persons interested therein, petitioned the judge of the said United States district court, praying that the forfeitures incurred by them as aforesaid might be mitigated or remitted. And the said judge having caused the said petitions, with certain statements of facts, to be transmitted to the honorable Secretary of the Treasury of the United States, in accordance with the first section of the said act of the 3d March, 1797, the said Secretary of the Treasury did, by sundry acts of remission, and in accordance with the act of Congress of the 2d January, 1813, entitled "*An act directing*

the Secretary of the Treasury to remit fines, penalties, and forfeitures in certain cases," (2 Statutes at Large, p. 789,) remit to said petitioners all the fines, penalties, and forfeitures which they had incurred as aforesaid upon the costs and charges that had arisen, or might thereafter arise, being paid, and in payment of the *duties* which would have been payable by law on said goods and merchandise if legally imported, and did also direct the prosecutions which had been instituted to cease and be discontinued on the payment of the costs, charges, and duties as aforesaid. Your petitioner further shows, that the said acts of remission were granted by the Secretary of the Treasury before the said merchandise was decreed or adjudged by the said court to be forfeited, and that, in accordance with said acts of remission, the said petitioners paid the costs and charges attending the proceedings which had been instituted, and also paid and discharged the bonds which had been given as for the duties on said merchandise. That the amount so paid as for duties on the said merchandise, in accordance with the reservation in said acts of remission, was the sum of four hundred and eighty-six thousand six hundred and forty-nine dollars and eighty cents.

That the money so paid was, by the said James H. McCulloh, collector as aforesaid, in accordance with the then settled practice of the Treasury Department, accounted for and wholly paid into the treasury of the United States in the same manner as lawful duties were accounted for and paid. That James H. McCulloh, collector as aforesaid, departed this life on or about the 10th day of November, 1836, and that your petitioner soon afterwards qualified as his executor.

In view of the facts herein set forth, your petitioner claims that, under the provisions of the ninety-first section of the said act of the 2d March, 1799, the said James H. McCulloh, collector as aforesaid, was, in his lifetime, justly and lawfully entitled, and your petitioner, his executor, is now entitled to one-sixth of the said sum of money so accounted for and received by the United States, as for duties on the said forfeited merchandise, which one-sixth amounts to a large sum of money, to wit, the sum of eighty-one thousand one hundred and eight dollars and thirty cents.

Nevertheless, the United States did not, in the lifetime of the said James H. McCulloh, collector as aforesaid, pay to him the said sum of eighty-one thousand one hundred and eight dollars and thirty cents, or any part thereof, nor to your petitioner since his death, but continues to hold the same contrary to the rights of your petitioner, who avers that, so far as he is informed or believes, no action upon the said claim has ever been had in Congress, or by any departments of the government.

Your petitioner is solely interested in said claim, as executor and as sole devisee of his father, James H. McCulloh, deceased.

BRENT & KINZER,

Attorneys for Petitioner.

STATE OF MARYLAND, }
City of Baltimore, } *to wit:*

James H. McCulloh this day personally appeared before the undersigned, a justice of the peace for the city and State aforesaid, and made oath, in due form of law, that the facts set forth in the foregoing petition signed by him are true, so far as they rest in his own knowledge; and so far as they rest on the information of others he believes them to be true.

Given under my hand this ——— day of June, A. D. 1857.

THE STATE OF MARYLAND, }
Baltimore City, } *sc.*

The subscriber, register of wills for Baltimore city, doth hereby certify that it appears by the records in his office that letters of administration of all the goods, chattels, and credits, of James H. McCulloh, deceased, were on the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and thirty-six, granted and committed unto James H. McCulloh, the executor by the last will and testament of the said deceased appointed.

In testimony whereof, I hereunto subscribe my name and affix the
 [SEAL.] seal of my office, this 26th day of October, in the year of
 our Lord eighteen hundred and fifty-seven.

N. HICKMAN,
Register of Wills for Baltimore City.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

IN THE DISTRICT COURT.

The United States *vs.* 1,720 packages of merchandise and 72 tons of coal.

Information filed September 18, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; claims filed; valuation bonds filed, and property restored to the claimants, and continued.

Released by the Secretary of the Treasury.

The United States *vs.* 303 packages of merchandise, 10 tons of coal, and 51 tons of salt.

Information filed September 18, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; claims filed; valuation bonds filed, and property restored to the claimants, and continued.

Released by the Secretary of the Treasury.

The United States *vs.* 1,719 packages of merchandise.

Information filed September 18, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; claims filed; valuation bond filed, and property restored to the claimants, and continued.

Released by the Secretary of the Treasury.

The United States *vs.* 6,343 bundles, &c., of merchandise and a quantity of coal.

Information filed October 28, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; valuation filed; claims filed; valuation bond filed; property restored to the claimants, and continued.

Released by the Secretary of the Treasury.

The United States *vs.* 1,704 bundles, &c., of merchandise.

Information filed October 28, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; valuation filed; claim filed; valuation bond filed, and property restored to the claimants, and continued.

Released by the Secretary of the Treasury.

The United States *vs.* 393 packages of merchandise, 169 tons of salt, and 40 tons of coal.

Information filed October 20, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; valuation filed; claim filed; valuation bond filed, and property restored to the claimants, and continued.

Released by the Secretary of the Treasury.

The United States *vs.* 3,020 bundles, rolls, and packages of merchandise.

Information filed October 20, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; valuation filed; claim filed; valuation bond filed, and property restored to the claimants, and continued.

Released by the Secretary of the Treasury.

The United States *vs.* 965 packages of merchandise.

Information filed October 6, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; valuation filed; claim filed; valuation bond filed, and property restored to the claimants, and continued.

Released by the Secretary of the Treasury.

The United States *vs.* 149 tons of salt, 40 tons of coal, and 298 crates of earthenware.

Information filed October 8, 1812; proclamation, &c., issued to December; bond to respond; costs filed; warrant of appraisement issued; appraisers sworn; valuation filed; claim filed; valuation bond filed, and property restored to the claimant, and continued.

Released by the Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing are true copies of the docket entries in the above cases; and I do further certify that by the said entries it does not appear that any decrees were entered therein.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said district court, this fourteenth day of October, [L. s.] in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

THE UNITED STATES
vs. } Information.
 1,720 packages of merchandise and 72 tons of coal. }

In the district court of the United States of America in and for the Maryland district.

MARYLAND DISTRICT, *to wit:*

Be it remembered, that on this eighteenth day of September, in the year eighteen hundred and twelve, into the district court aforesaid comes Elias Glenn, attorney of the United States for the same district, who, for the said United States, gives the court here to understand and be informed that James H. McCulloh, esq., collector of the customs for the district of Baltimore, on the thirteenth day of September, in the year aforesaid, at the port of Baltimore, in the Maryland district aforesaid, did, on waters navigable from the seas by vessels of ten or more tons burden, seize to the use of the said United States, as forfeited, seventeen hundred and twenty packages of merchandise and seventy-two tons of coal, the property of some person or persons to the said attorney unknown, for that the said seventeen hundred and twenty packages of merchandise and seventy-two tons of coal being of the growth, produce, or manufacture of Great Britain, were imported into the said United States, to wit: into the port of Baltimore, in the Maryland district, after the first day of January, in the year eighteen hundred and twelve, and before the exhibition of this information, from Liverpool, a port of Great Britain, on board the ship Marcellus, William Ward master, contrary to the form of the statutes of the said United States in such case made and provided. And the said attorney doth aver that the said ship Marcellus had not cleared out for the Cape of Good Hope, or for any port beyond the same, prior to the tenth day of November, in the year eighteen hundred and ten, and that the said ship Marcellus did not

depart from the said port of Liverpool prior to the second day of February, eighteen hundred and eleven, by reason whereof, and also by force of the statutes of the said United States, the said seventeen hundred and twenty packages of British merchandise and the said seventy-two tons of coal, the produce of Great Britain, have become forfeited to the said United States; whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court here in the premises, and that due process may issue, and that the said seventeen hundred and twenty packages of merchandise and the said seventy-two tons of coal may be condemned as forfeited according to law.

ELIAS GLENN,

Attorney of the United States for the Maryland District.

THE UNITED STATES

vs.

1,720 packages of merchandise and 72 tons
of coal, imported in the ship Marcellus.

} Claim.

Lewis Krumbheiner, Lewin Wethered, Henry Shroeder & Co., Timothy Wiggin, William H. Scott, Poultney & Thomas, Eichelberger & Clemm, Thomas & Isaac Edmondson, Philip E. Thomas & George, Comegys, Falconer & Co., Mark U. Pringle, William Baker & Sons, Kimmel & Albert, McCulloch & Poor, Blair & Dall, Thomas Perkins, Crosdale & Gibson, Peter Diffenderffer, George Frederick & Jacob Lindenberger, Schultze & Proebsting, Robert Miller, Frederick Jordan, Richard Norris, George Grundy & Sons, George Hoffman, William Booth, Campbell & Ritchie, William & Joseph Wilkins, Fridge & Morris, William Baker & Sons, Luke Tiernan & Co., Charles Waring & Co., Ezra Hounsfield, John Robertson, Lewin Wethered, James Pauley, Joseph Todhunter, Elisha Brown, Prentis & Carter, John Heathcote, Alexander Brown & Sons, appear in court, by John Purviance, their attorney, and claim the said seventeen hundred and twenty packages of merchandise as the property of the said several persons and houses of trade above mentioned, in the manner and according to the numbers respectively particularized and contained in the copy of the manifest of the said cargo herewith filed, and which they pray may be considered as part of this their claim; and they deny that the said packages of goods are justly forfeited to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esq., their attorney; wherefore they pray the restoration of the said packages of merchandise to the said claimants, respectively, according to the manifest before exhibited, and that they may be dismissed this court with costs, to be adjudged to them for this illegal seizure.

J. PURVIANCE,

Proctor for Claimants.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claim on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the [L. s.] seal of the said district court, this sixth day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

THE UNITED STATES
vs.
 303 packages of merchandise, 10 tons
 of coal, and 51 tons of salt. } Information.

In the district court of the United States of America in and for the Maryland district, to wit:

MARYLAND DISTRICT, *to wit:*

Be it remembered, that on this eighteenth day of September, in the year eighteen hundred and twelve, into the district court aforesaid comes Elias Glenn, attorney of the United States for the same district, who, for the said United States, gives the court here to understand and be informed that James H. McCulloh, esquire, collector of the customs for the district of Baltimore, on the thirteenth day of September, in the year aforesaid, at the port of Baltimore, in the Maryland district aforesaid, did, on waters navigable from the sea by vessels of ten or more tons burden, seize to the use of the United States, as forfeited, three hundred and three packages of merchandise, ten tons of coal, and fifty-one tons of salt, the property of some person or persons to the said attorney unknown, for that the said three hundred and three packages of merchandise, ten tons of coal, and fifty-one tons of salt being of the growth, produce, or manufacture of Great Britain, were imported into the said United States, to wit: into the port of Baltimore, in the Maryland district, after the first day of January, in the year aforesaid, and before the exhibition of this information, from Liverpool, a port of Great Britain, on board the brig Penobscot, S. Perkins master, contrary to the form of the statutes of the said United States in such case made and provided. And the said attorney doth aver that the said brig Penobscot had not cleared out for the Cape of Good Hope, or for any port beyond the same, prior to the tenth day of November, in the year eighteen hundred and ten, and that the said brig Penobscot did not depart from the said port of Liverpool prior to the second day of February, eighteen hundred and eleven; by reason whereof, and also by force of the statutes of the said United States, the said three hundred and three

packages of merchandise, and the said ten tons of coal and fifty-one tons of salt, the produce of Great Britain, have become forfeited to the said United States; whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court in the premises, and that due process may issue, and that the said three hundred and three packages of merchandise, ten tons of coal, and fifty-one tons of salt may be condemned as forfeited according to law.

ELIAS GLENN,

Attorney of the United States for the Maryland District.

THE UNITED STATES

vs.

303 packages of merchandise, 10 tons
of coal, and 51 tons of salt.

} Claim.

Matthew Smith comes here into court, and, by John Purviance, his attorney, claims the above mentioned three hundred and three packages of merchandise, ten tons of coal, and fifty-one tons of salt, as his sole property, and denies that they are justly forfeited to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esquire, their attorney. Wherefore he prays the restoration of the said goods, and that the information aforesaid may be dismissed, with costs to be adjudged to him for this illegal seizure.

J. PURVIANCE,

Attorney for Claimant.

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claim on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said district court, this third day of October, in
[L. s.] the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

THE UNITED STATES	}	Information.
<i>vs.</i>		
1,719 packages of merchandise.		

In the district court of the United States of America in and for the Maryland district.

MARYLAND DISTRICT, *to wit* :

Be it remembered, that on this eighteenth day of September, in the year eighteen hundred and twelve, into the district court aforesaid comes Elias Glenn, attorney of the United States for the same district, who, for the said United States, gives the court here to understand and be informed that James H. McCulloh, esq., collector of the customs for the district of Baltimore, on the thirteenth day of September, in the year aforesaid, at the port of Baltimore, in the Maryland district aforesaid, did, on waters navigable from the sea by vessels of ten or more tons burden, seize to the use of the said United States, as forfeited, seventeen hundred and nineteen packages of merchandise, the property of some person or persons unknown to the said attorney, for that the said seventeen hundred and nineteen packages of merchandise being of the produce or manufacture of Great Britain were imported into the said United States, to wit: into the port of Baltimore, in the Maryland district, after the first day of January, in the year eighteen hundred and twelve, and before the exhibition of this information, from Liverpool, a port of Great Britain, on board the ship *Minerva*, Jaazoniah Gross master, contrary to the statutes of the United States in such case made and provided. And the said attorney doth aver that the said ship *Minerva* had not cleared out for the Cape of Good Hope, or for any port beyond the same, prior to the tenth day of November, in the year eighteen hundred and ten, and that the said ship *Minerva* did not depart from the said port of Liverpool prior to the second day of February, in the year eighteen hundred and eleven; by reason whereof, and also by force of the statutes of the said United States, the said seventeen hundred and nineteen packages of merchandise have become forfeited to the said United States; whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court here in the premises, and that due process may issue, and that the said seventeen hundred and nineteen packages of British merchandise may be condemned as forfeited according to law.

ELIAS GLENN,

Attorney of the United States for the Maryland District.

THE UNITED STATES	}	Claim.
<i>vs.</i>		
1,719 packages of merchandise.		

Poultney & Thomas, Philip E. Thomas & George, Henry Schroeder & Co., McKim & Maslin, John Swan & Co., David Warfield, Richard Norris, Norris & Co., George Frederick and Jacob Lindenberger,

Comegys, Falconer & Co., McCulloch & Poor, Kimmel & Albert, J. H. Browning & Co., Richard Rateen, Wm. & Richard Hall, Edward Jenkins, Wilson & Mulliken, Lewin Wethered, Samuel Hardon, George & Jeremiah Howard, Henry Thompson, James C. Neilson, Isaac & Thomas Edmondson, William & Henry Scott, William Alcock, William & Joseph Wilkins, Luke Tiernan & Co., James Owings, William Cochran & Brothers, William Baker & Sons, Elisha Brown, George Grundy & Sons, Nathaniel W. & Charles Appleton, Coonthwait & Carey, Nathan Levering, Campbell & Ritchie, John Heathcote, Fridge & Morris, Joseph Todhunter, Ezra Hounsfield, Charles Zollers, Blair & Dall, Dennis A. Smith, James Pauley, John Robinson, Crosdale & Gibson, Alexander Brown & Sons, George Hoffman, Schultz & Probsting, Eichelberger & Clemm, Frederick Indan, Thomas Parker, Bolton Jackson, Messieurs Chapman, Benjamin Wiggin, J. Gross, Nathan Levering, A. J. Foster, David Warfield, Charles Warfield, by John Purviance, their attorney, and claim the said three hundred and three packages of merchandise, ten tons of coal, and fifty-one tons of salt, as the property of the several persons and houses in trade above named in the manner and according to the numbers, as contained and particularized in a copy of the manifest herewith filed and exhibited, and which they pray may be received as part of this their claim. And they deny that said packages and merchandise are justly forfeited to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esq., their attorney: wherefore they pray the restoration of the said packages and merchandise to them, the said claimants, respectively belonging, according to the specification and numbers contained in the manifest before mentioned; wherefore they pray that they may be dismissed this honorable court with costs, to be adjudged to them for this illegal seizure of the goods and merchandise aforesaid.

JOHN PURVIANCE,
Proctor for Claimants.

THE UNITED STATES
vs.

84 packages of hardware, imported in the ship Minerva.

} Claim.

Robert Halliday comes into court, by John Purviance, his attorney, and claims the above mentioned packages of goods and merchandise, as his sole property, and denies that the same are justly forfeited to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esq., their attorney; wherefore he prays the restoration of the said goods and merchandise, and that the information aforesaid may be dismissed with costs, to be adjudged for this illegal and unjustifiable seizure.

JOHN PURVIANCE,
Attorney for Mr. Halliday.

THE UNITED STATES OF AMERICA, }
District of Maryland, } to wit:

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claims on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the [L. S.] seal of the said district court, this third day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

THE UNITED STATES
vs.
 6,343 rolls, rods, bundles, and packages of }
 goods, and a quantity of coal. } Information.

In the district court of the United States of America in and for the Maryland district.

MARYLAND DISTRICT, to wit:

Be it remembered, that on this twenty-eighth day of October, eighteen hundred and twelve, into the district court aforesaid comes Elias Glenn, attorney of the United States for the Maryland district, who, for the said United States, gives the court here to understand and be informed that James H. McCulloh, esq., collector of the customs for the port of Baltimore, on the twenty-seventh day of October, in the year aforesaid, at the port of Baltimore, in the Maryland district aforesaid, did, on waters navigable from the sea by vessels of ten or more tons burden, seize to the use of the United States, as forfeited, six thousand three hundred and forty-three rolls, rods, bundles, and other packages of goods, and also a quantity of coal, which quantity is to the said attorney unknown, the produce and manufacture of Great Britain, the property of some person or persons to the said attorney unknown, for that the said six thousand three hundred and forty-three rolls, rods, bundles, and other packages of goods, and the unknown quantity of coal, being of the produce or manufacture of Great Britain, were imported into the said United States, to wit: into the port of Baltimore, in the Maryland district, after the eighteenth day of June, in the year aforesaid, and before the exhibition of this information, from Liverpool, a port of Great Britain, on board the ship *Merrimac*, Charles Cook master, contrary to the forms of the statutes of the United States in such case made and provided. And the said attorney doth aver that the said ship *Merrimac* had not cleared out for the Cape of Good Hope, or any port beyond the same, prior to the tenth day of November, eighteen hundred and ten; and that the said ship *Merrimac* did not depart from the said port of Liverpool prior to the second day of February

eighteen hundred and eleven; by reason whereof, and also by force of the statutes of the said United States, the said six thousand three hundred and forty-three rolls, rods, bundles, and other packages of goods, and the said unknown quantity of coal, the produce and manufacture of Great Britain, have become forfeited to the said United States; whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court in the premises, and that due process may issue, and that the said six thousand three hundred and forty-three rolls, rods, bundles, and other packages of goods, together with the said unknown quantity of coal, may be condemned as forfeited by law.

ELIAS GLENN,

Attorney of the United States for Maryland District.

THE UNITED STATES

vs.

6,343 rolls, rods, bundles, and packages,
and a quantity of coal.

} Claim.

And whereupon William Baker & Sons, Edward Harris, Elisha Browne, W. & J. Wilkins, Luke Tiernan & Co., John Wilkinson & Co., Poultney & Thomas, Campbell & Ritchie, Fridge & Morris, Washington Hall, Bolton Jackson, N. W. & C. H. Appleton, Robert Halliday, Kimmel & Albert, John H. Browning & Co., Christopher Johnson, William M. Beall, Eichelberger & Clemm, Comegys, Falconer & Co., Thomas & Isaac Edmondson, Robert Miller, Peter Hoffman, George Hoffman, Peter Hoffman & Sons, William & Henry Scott, John Heathcote, John Robinson, and Ebenezer & John Breed, appear in court, by Nathaniel Williams, their attorney, and claim the said six thousand three hundred and forty-three rolls, rods, bundles, and packages of merchandise, and the said quantity of coal, as their property, according to the manifest of the cargo shipped in the Merrimac, which said manifest is referred to as part of this claim, and in which is stated the goods and merchandise respectively belonging to each of said claimants. And they severally deny that the said goods and merchandise so as aforesaid owned are justly forfeited to the United States for the causes set forth in the information filed in this honorable court, on behalf of the said United States, by Elias Glenn, esq., their attorney; wherefore they severally pray the restoration of the said goods and merchandise, and that the information aforesaid may be dismissed with costs, to be adjudged for this unfounded prosecution.

NATHANIEL WILLIAMS,

Proctor for claimants.

THE UNITED STATES

vs.

Sundry goods and merchandise imported
in the ship Merrimac.

} Claim.

William and Joseph Wilkins, of the city of Baltimore, merchants, appear in court and claim eight cases marked W. & J. W., numbered

from 1 to 8; three cases marked W. & J. W., numbered 1, as their sole property, and deny that the same are forfeitable to the United States for the causes set forth in the information filed in this honorable court by Elias Glenn, esquire, their attorney. Wherefore they pray a restoration of the said goods, and that the information aforesaid may be dismissed, with costs to be adjudged for this vexatious prosecution.

JOHN PURVIANCE.

THE UNITED STATES	}	Claim.
<i>vs.</i>		
Sundry goods and merchandise imported in the ship Merrimac.		

Samuel McKean appears in court and claims the following goods and merchandise imported in the ship Merrimac, to wit: ———, as the property of McKean & Woodland, and denies that the same are justly forfeitable to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esquire, their attorney. Wherefore he prays a restoration of the said goods and merchandise, and that the information aforesaid may be dismissed, with costs to be adjudged for this unfounded prosecution.

JOHN PURVIANCE,
Proctor for Claimants.

THE UNITED STATES	}	Claim.
<i>vs.</i>		
One cask of merchandise imported in the ship Merrimac.		

John H. Browning appears in court, by John Purviance, his proctor, and claims the said cask of merchandise as the property of John H. Browning and Joseph Biays, and denies that the same is justly forfeitable to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esquire, their attorney. Wherefore he prays the restoration of the said cask of merchandise, and that the information aforesaid may be dismissed, with costs to be adjudged for this unfounded prosecution.

JOHN PURVIANCE,
Proctor for Claimants.

THE UNITED STATES	}	Claim.
<i>vs.</i>		
Sundry goods and merchandise imported in the ship Merrimac.		

Michael Kimme and Jacob Albert appear in court, by John Purviance, their proctor, and claim the following bales or packages of goods and merchandise, marked [K] [A], as their sole property, and deny that the same are forfeitable to the United States for the causes

set forth in an information filed in this honorable court, on behalf of the United States, by Elias Glenn, esquire, their attorney. Wherefore they pray restoration of the said goods, and that the information aforesaid may be dismissed, with costs to be adjudged to them for this unfounded prosecution.

JOHN PURVIANCE,
Proctor for claimants.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claims on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the seal of the said district court, this fifth day of October, in [L. S.] the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

THE UNITED STATES
vs.
1,704 bundles and packages of merchandise. } Information.

In the district court of the United States of America in and for the Maryland district.

MARYLAND DISTRICT, *to wit:*

Be it remembered that on this twenty-eighth day of October, eighteen hundred and twelve, into the district court aforesaid comes Elias Glenn, attorney of the United States for the same district, who, for the said United States, gives the court here to understand and be informed that James H. McCulloh, esq., collector of the customs for the port of Baltimore, on the twenty-seventh day of October, in the year aforesaid, at the port of Baltimore, in the Maryland district aforesaid, did, on waters navigable from the sea by vessels of ten or more tons burden, seize to the use of the United States as forfeited seventeen hundred and four bundles and packages of merchandise, the produce or manufacture of Great Britain, the property of some person or persons to the said attorney unknown, for that the said seventeen hundred and four bundles and packages of merchandise being of the produce or manufacture of Great Britain, were imported into the said United States, to wit: into the port of Baltimore, in the Maryland district, after the eighteenth day of June, in the year aforesaid, and before the exhibition of this information, from London, a port of Great Britain, on board the brig Ann, John Page, master, contrary to the forms of the statutes of the said United States in such case made and provided. And the said attorney doth

aver that the said brig Ann had not cleared out for the Cape of Good Hope or any port beyond the same, prior to the tenth day of November, eighteen hundred and ten, and that the said brig Ann did not depart from the said port of London prior to the second day of February, eighteen hundred and eleven, by reason whereof, and also by force of the statutes of the said United States the said seventeen hundred and four bundles and packages of merchandise, the produce or manufacture of Great Britain, have become forfeited to the said United States; whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court in the premises, and that due process may issue, and that the said seventeen hundred and four bundles and packages of merchandise may be condemned as forfeited according to law.

ELIAS GLENN,

Attorney of the United States for the Maryland District.

THE UNITED STATES

vs.

1,704 bundles and packages of merchandise.

} Claim.

And whereupon Boswell, Morris & Jones, Comegys, Falconer & Co., Crosdale & Gilson, George Grundy & Sons, Lewin Withered, Robert Miller, T. & I. Edmondson, Schultze & Vogeler, Hezekiah Clagett, Alexander Brown & Sons, Philip Thomas, Richard Caton, C. Burnett, John McKim, jr., Campbell & Ritchie, E. J. Pierce, John D. Craig, Joseph Todhunter, Luke Tiernan & Co., Poultney & Thomas, Thomas & George, Armour & Jenkins, McKim & Maslin, John Trull, William Alcock, William & Joseph Wilkins, John Peck, John Kingston, J. L. D'Arcy, William Cooper, B. de Remier, Peter Hoffman & Sons, George Hoffman, Peter Hoffman, John Heathcote, Kennedy Long, Isaac McKim, John McKim, jr., D'Arcy & Didier, William King & Baltimore Library Company, and James Kirby, appear in court by Nathaniel Williams, their proctor, and claim the said seventeen hundred and four bundles, rolls, and packages of goods and merchandise as their property, according to the manifest of the cargo shipped in the Ann, which said manifest is referred to as part of this claim, and in which is stated the goods and merchandise respectively belonging to each of the said claimants; and they severally deny that the said goods and merchandise so as aforesaid owned, are justly forfeited to the United States for the causes set forth in the information filed in this honorable court on behalf of the United States by Elias Glenn, esq., their attorney; wherefore they severally pray the restoration of said goods and merchandise, and that the information aforesaid may be dismissed with costs, to be adjudged for this unfounded prosecution.

NATHANIEL WILLIAMS,

Proctor for claimants.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claim on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the
 [L. s.] seal of the said district court this fifth day of October, in the
 year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

THE UNITED STATES, }
vs. } Information.
 393 bundles, rolls, and packages of merchandise,
 169 tons salt, 40 tons of coal. }

*In the district court of the United States of America in and for the
 Maryland district*

MARYLAND DISTRICT, *to wit:*

Be it remembered that on this twentieth day of October, in the year of our Lord one thousand eight hundred and twelve into the district court aforesaid comes Elias Glenn, attorney of the United States for the same district who for the said United States gives the court here to understand and be informed, that James H. McCulloh esquire, collector of the customs for the district of Baltimore on the twentieth day of October, in the year aforesaid at the port of Baltimore in the Maryland district aforesaid, did on waters navigable from the sea by vessels of ten or more tons burthen, seize to the use of the said United States as forfeited, three hundred and ninety-three bundles, rolls, and packages of merchandise, one hundred and sixty-nine tons of salt and forty tons of coal, the produce or manufacture of Great Britain, the property of some person or persons to the said attorney unknown, for that the said three hundred and ninety-three bundles, rolls, and packages of merchandise, one hundred and sixty-nine tons of salt and forty tons of coal being of the produce or manufacture of Great Britain were imported into the said United States, to wit, into the port of Baltimore in the Maryland district after the eighteenth day of June in the year aforesaid and before the exhibition of this information from Liverpool, a port of Great Britain, on board the ship Frederick, George King master, contrary to the form of the statutes of the said United States in such case made and provided. And the said attorney doth aver that the said ship Frederick had not cleared out for the Cape of Good Hope nor for any port beyond the same prior to the tenth day of November eighteen hundred and ten, and that the said ship Frederick did not depart from the said port of Liverpool prior to the second day of February, eighteen hundred and eleven, by reason, whereof, and also by force of the statutes of the said United States the said three hundred and ninety-three bundles, rolls,

and packages of merchandise, one hundred and sixty-nine tons of salt and forty tons of coal, the produce or manufacture of Great Britain have become forfeited to the said United States. Whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court in the premises, and that due process may issue and that the said three hundred and ninety-three bundles, rolls, and packages of merchandise, one hundred and sixty-nine tons of salt and forty tons of coal may be condemned as forfeited according to law.

E. GLENN,

Attorney of the United States for Maryland district.

THE UNITED STATES

vs.

393 bundles, rolls and packages of merchandise,
169 tons of salt, 40 tons of coal.

} Claim.

William D. McKim, Comegys, Falconer & Company, Joseph Jaroney, Matthew Smith, Christopher Johnson, Kemmel & Abbott, Benjamin H. Mulliken, William Cooke Jr., John Jaroney, Robert Miller, Darcy & Didier, Durkee, Henderson & Company, William Wilson & Sons, James Pawley, Robert and Alexander McKim, G. F. & J. Linderberger, Wilson & Milliken, Bolton Jackson, Luke Tiernan & Company, James Keyser, Darick Keyser, James C. Neilson, Gamaliel Bryant, McKean & McClellan, Gamaliel Bryant, Jr., David Thacher, and Benjamin Bastow, appear in court by Nathaniel Williams their proctor, and claim the said three hundred and ninety-three bundles, rolls, and packages of merchandise, one hundred and sixty-nine tons of salt and forty tons of coal as their property, severally, according to the particulars and proportions set forth in the manifest and bills of lading of the ship Frederick to which the claimants aforesaid beg leave to refer as part of this their claim; and they deny that the said goods and merchandise are justly forfeited to the United States for the causes set forth in the information filed in this honorable court by Elias Glenn, Esq., attorney on behalf of the United States; wherefore they pray a restoration of the said goods and merchandise, and that the information aforesaid may be dismissed with costs to be adjudged for this unfounded prosecution.

NATHANIEL WILLIAMS,

Proctor for claimants.

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claim on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the
[L. S.] seal of the said district court this fifth day of October in the
year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of District Court.

THE UNITED STATES
vs. } Information.
 3,020 bundles, rolls, and packages of merchandise. }

In the district court of the United States of America, in and for the Maryland district.

MARYLAND DISTRICT, *to wit*:

Be it remembered, that on this twentieth day of October, in the year of our Lord one thousand eight hundred and twelve, in the district court aforesaid, comes Elias Glenn, attorney of the United States for the same district, who, for the said United States, gives the court here to understand and be informed that James H. McCulloh, esq., collector of the customs for the district of Baltimore, on the nineteenth day of October, in the year aforesaid, at the port of Baltimore, in the Maryland district aforesaid, did, on waters navigable from the sea by vessels of ten or more tons burden, seize to the use of the said United States, as forfeited, three thousand and twenty bundles, rolls, and packages of merchandise, the property of some person or persons to the said attorney unknown, for that the said three thousand and twenty bundles, rolls, and packages of merchandise being of the produce or manufacture of Great Britain, were imported into the said United States, to wit: into the port of Baltimore, in the Maryland district, after the eighteenth day of June, in the year aforesaid, and before the exhibition of this information from Bristol, a port of Great Britain, on board the brig Female, Christopher Child, master, contrary to form of the statutes of the said United States in such case made and provided; and the said attorney doth aver that the said brig Female had not cleared out for the Cape of Good Hope, or for any port beyond the same, prior to the tenth day of November, eighteen hundred and ten, and that the said brig Female did not depart from the port of Bristol prior to the second day of February, eighteen hundred and eleven, by reason whereof, and also by force of the statutes of the said United States, the said three thousand and twenty bundles, rolls, and packages of merchandise, the produce or manufacture of Great Britain, have become forfeited to the said United States: whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court in the premises, and that due process may issue, and that the said three thousand and twenty bundles, rolls, and packages of merchandise may be condemned as forfeited, according to law.

E. GLENN,

Attorney of the United States for the Maryland district.

THE UNITED STATES
vs. } Claim.
 3,020 bundles, rolls, and packages of merchandise. }

Three thousand and twenty bundles, rolls, and packages of merchandise, imported in the brig Female.

Luke Tiernan and Kennedy Owen appear in court by John Pur-

viance, their proctor, and claim the said three thousand and twenty bundles, rolls, and packages of merchandise, as their property, and deny that the said goods and merchandise are justly forfeited to the United States for the causes set forth in the information filed in this honorable court by Elias Glenn, esq., attorney on behalf of the United States: wherefore they pray a restoration of the said goods, and that the information aforesaid may be dismissed with costs, to be adjudged for this unfounded prosecution.

JOHN PURVIANCE,
Proctor for claimants.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claim on file among the records and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said district court, this sixth day of October, in [SEAL.] the year of our Lord, one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

THE UNITED STATES
vs. } Information.
965 packages of merchandise. }

In the district court of the United States of America in and for the Maryland district.

MARYLAND DISTRICT, *to wit:*

Be it remembered that on this sixth day of October, in the year of our Lord one thousand eight hundred and twelve, into the district court aforesaid comes Elias Glenn, attorney of the United States for the same district, who, for the said United States, gives the court here to understand and be informed that James H. McCulloh, esquire, collector of the customs for the district of Baltimore, on the third day of October, in the year aforesaid, at the port of Baltimore, in the Maryland district aforesaid, did, on waters navigable from the sea by vessels of ten or more tons burden, seize to the use of the said United States, as forfeited, nine hundred and sixty-five packages of merchandise, the property of some person or persons to the said attorney unknown, for that the said nine hundred and sixty-five packages of merchandise, being of the produce or manufacture of Great Britain, were imported into the said United States, to wit: into the port of Baltimore, in the Maryland district, after the eighteenth

day of June, in the year aforesaid, and before the exhibition of this information, from London, a port of Great Britain, on board the ship Concordia, Atkins Adams, master, contrary to the form of the statutes of the said United States in such case made and provided; and the said attorney doth aver that the said ship Concordia had not cleared out for the Cape of Good Hope, or for any port beyond the same, prior to the tenth day of November, in the year eighteen hundred and ten, and that the said ship Concordia did not depart from the said port of London prior to the second day of February, eighteen hundred and eleven; by reason whereof, and also by force of the statutes of the said United States, the said nine hundred and sixty-five packages of merchandise, the produce or manufacture of Great Britain, have become forfeited to the said United States; whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court in the premises, and that due process may issue, and that the said nine hundred and sixty-five packages of merchandise may be condemned as forfeited according to law.

ELIAS GLENN,

Attorney of the United States for Maryland District.

THE UNITED STATES	}	Claim.
<i>vs.</i>		
965 packages of merchandise.		

And whereupon George Hoffman, John Hoffman, Luke Tiernan & Co., Kennedy Owen, Peter Hoffman, jr., Joseph Lapsey, John Peck, Joseph Smith & Son, Campbell & Ritchie, William Alcock, Fridge & Morris, Gillingham & Randolph, Lewin Wethered, James Ramsey, William & Joseph Wilkins, Hemming & Hale, William Cochran & Brothers, and Thomas F. Grant, appear in court and claim the above mentioned goods and merchandise as their property, according to the manifest thereof, (a copy whereof is herewith filed,) in which is stated the goods and merchandise respectively belonging to each of the said claimants; and they severally deny that the said goods and merchandise, so as aforesaid owned, are justly forfeited to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esquire, their attorney; wherefore they severally pray the restoration of the said goods and merchandise, and that the information aforesaid may be dismissed, with costs to be adjudged for this illegal and unjustifiable seizure.

V. MAXEY, and

J. PURVIANCE,

Attorneys for the Claimants.

THE UNITED STATES	}	Claim.
<i>vs.</i>		
16 packages of merchandise imported in the ship Concordia, Atkins Adams, master.		

James Kirby appears in court, by John Purviance, his attorney, and claims the above mentioned sixteen packages of merchandise,

and denies that the same are justly forfeitable to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esquire, their attorney; wherefore he prays a restoration of the said sixteen packages of merchandise, and that the information aforesaid may be dismissed, with costs to be adjudged to him for this unjust prosecution.

JOHN PURVIANCE,
Attorney for Claimant.

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claims on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the seal of the said district court, this sixth day of October, in
[L. s.] the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

THE UNITED STATES
vs.
149 tons of salt, 40 tons of coal, and } Information.
298 crates of earthenware.

In the district court of the United States of America in and for the Maryland district.

MARYLAND DISTRICT, *to wit:*

Be it remembered that on this second day of October, in the year eighteen hundred and twelve, into the district court aforesaid comes Elias Glenn, attorney of the United States for the same district, who, for the said United States, gives the court here to understand and be informed that James H. McCulloh, esq., collector of the customs for the district of Baltimore, on the thirtieth day of September, in the year aforesaid, at the port of Baltimore, in the Maryland district aforesaid, did, on waters navigable from the sea by vessels of ten or more tons burden, seize to the use of the said United States, as forfeited, one hundred and forty-nine tons of salt, forty tons of coal, and two hundred and ninety-eight crates of earthenware, the property of some person or persons to the said attorney unknown, for that the said one hundred and forty-nine tons of salt, forty tons of coal, and two hundred and ninety-eight crates of earthenware, being of the produce or manufacture of Great Britain, were imported into the said United States, to wit: into the port of Baltimore, in the Maryland

district, after the eighteenth day of June in the year aforesaid, and before the exhibition of this information, from Liverpool, a port of Great Britain, on board the ship Nancy, Job Choate, master, contrary to the form of the statutes of the said United States in such case made and provided; and the said attorney doth aver that the said ship Nancy had not cleared out for the Cape of Good Hope, or for any port beyond the same, prior to the tenth day of November, in the year eighteen hundred and ten, and that the said ship Nancy did not depart from the said port of Liverpool prior to the second day of February, eighteen hundred and eleven, by reason whereof, and also by force of the statutes of the said United States, the said one hundred and forty-nine tons of salt, forty tons of coal, and two hundred and ninety-eight crates of earthenware, the produce and manufacture of Great Britain, have become forfeited to the said United States. Whereupon the said attorney, prosecuting as aforesaid, prays the advice and consideration of the court in the premises, and that due process may issue, and that the said one hundred and forty-nine tons of salt, forty tons of coal, and two hundred and ninety-eight crates of earthenware may be condemned as forfeited according to law.

ELIAS GLENN,

Attorney for the United States for the Maryland District.

THE UNITED STATES

vs.

149 tons of salt, 40 tons of coal, and 298 crates of earthenware, imported in the ship Nancy.

} Claim.

Robert Barry and Washington Hall, by John Purviance, their attorney, appear in court and claim the said one hundred and forty-nine tons of salt, forty tons of coal, and two hundred and ninety-eight crates of earthenware, imported in the ship Nancy, as their joint property, and deny that the said goods and merchandise are justly forfeited to the United States for the causes set forth in the information filed in this honorable court, on behalf of the United States, by Elias Glenn, esquire, their attorney; wherefore they pray the restoration of the said goods and merchandise, and that the information aforesaid may be dismissed, with costs to be adjudged for this illegal and unjustifiable seizure.

JOHN PURVIANCE,

Attorney for the Claimants.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the information and claim on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the seal of the said district court, this sixth day of October, in
[L. s.] the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas seven statements of facts, bearing date the seventh day of June, 1813, together with the petitions of Kimmel & Albert, of John Wilkins & Co., of Nathaniel W., Charles H., and William Appleton, of William & Joseph Wilkins, of Joseph Janney, of John Janney, and of Christian L. Krumbhaar, hereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships Marcellus, Frederic, Minerva, Merrimac, Concordia, and brig Ann, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury, by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases;" as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear. And whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions. And whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-ninth day of June, in the year of our Lord [L. s.] one thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,
Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. s.] seal of the said district court this second day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

Petitioners.—Kimmel & Albert, John Wilkins & Co., Nathaniel W., Charles H. & William Appleton, William & Joseph Wilkins, Joseph Janney, John Janney, Christian L. Krumbhaar.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas eight statements of facts, bearing date the 7th day of June, 1813, together with the petitions of Benjamin H. Mulliken, of McKim & Maslin, of Samuel Harden, of Wilson & Mulliken, of John Swan & Co., of John H. Browning and Co., of Edward Jenkins, and of David Warfield, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships *Minerva* and *Frederic*, and brig *Ann*, have been incurred under a statute of the United States, entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute have been transmitted to the Secretary of the Treasury by the Judge of the United States for the District of Maryland, pursuant to the statute of the United States, entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States, may fully appear: And whereas, I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions: And whereas, it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties

aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve: Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid, all the fines, penalties and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable, by law, on the goods, wares and merchandise, if legally imported; and also, do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges and duties as aforesaid.

Given under my hand and seal of office in the city of Washington,
 [L. S.] this seventeenth day of June, in the year of our Lord one thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,
Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the aforesaid is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the
 [L. S.] seal of the said district court this second day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of District Court.

Petitioners.—Benjamin H. Mulliken, McKim & Maslin, Samuel Harden, Wilson & Mulliken, John Swan & Co., John H. Browning & Co., Edward Jenkins, David Warfield.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas six statements of facts, bearing date the seventh day of June, 1813, together with the petitions of William & Richard Hall, of Comegys, Falconer & Co., of Kennedy Long, of John McKim, jr. of Benjamin Taylor, and of Campbell & Ritchie, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships *Minerva*, *Marcellus*, *Merrimac*, *Frederic*, *Corcordia*, and brig *Ann*, have been incurred under a statute of the United States, entitled "An act to interdict

the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear. And whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions: And whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-first day of June, in the year of our Lord one [SEAL.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } to wit:

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. s.] seal of the said district court this third day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

Petitioners.—William & Richard Hall, Comegys, Falconer & Co., Kennedy Long, John McKim, jr., Benjamin Taylor, Campbell & Ritchie.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas six statements of facts, bearing date the seventh day of June, 1813, together with the petitions of Darcy & Didier, of Samuel Keyser, of James Ramsay, of Washington Hall & Robert Barry, of William D. McKim, and of Matthew Smith, thereto annexed, touching the forfeiture and penalties which, by reason of the importation of certain merchandise in the ships Nancy, Merrimac, Concordia, Frederic, and brig Ann, have been incurred under a statute of the United States, entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases;" as by the said statements of facts and petitions remaining in the Treasury Department of the United States, may fully appear. And whereas, I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid, all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise, being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-first day of June, in the year of our Lord one [SEAL.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the records and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said district court, this first day of October, in [SEAL.] the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

Petitioners.—Darcy & Didier, Samuel Keyser, James Ramsay, Washington Hall, Robert Barry, William D. McKim, and Matthew Smith.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas eight statements of facts, bearing date the 7th day of June, 1813, together with the petitions of James Owings, of James C. Neilson, of John Heathcote, of William Baker & Son, of Joseph Todhunter, of Bolton Jackson, of John Robinson, and of Henry Schroder & Co., thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships Marcellus, Minerva, Frederic, Merrimac, Hercules, and brig Ann, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes;" and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear. And whereas I, the said Secretary of the Treasury, have maturely considered the

said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were at the time of their shipment *bona fide* owned by citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise, if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office in the city of Washington, [L. S.] this seventeenth day of June, in the year of our Lord one thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. S.] seal of the said district court, this second day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of District Court.

Petitioners.—James Owings, James C. Neilson, John Heathcote, William Baker & Son, Joseph Todhunter, Bolton Jackson, John Robinson, Henry Schroder & Co.

To all to whom these presents may come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas six statements of facts, bearing date the seventh day of June, 1813, together with the petitions of Isaac McKim, of William

Alcock, of John S. Peck, of the Baltimore Library Company, of Erasmus I. Pierce, and of John Kingston, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the brig Ann and ships Minerva and Concordia, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases;" as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear. And whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions. And whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on the payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this seventeenth day of June, in the year of our Lord one [L. S.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,
Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the
L. S.] seal of the said district court this first day of October, in the
year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

Petitioners.—Isaac McKim, William Alcock, John S. Peck, the
Baltimore Library Company, Erasmus I. Pierce, John Kingston.

To all to whom these presents shall come, I, William Jones, Acting
Secretary of the Treasury of the United States, send greeting:

Whereas eight statements of facts, bearing date the 7th day of
June, 1813, together with the petitions of Thomas Goodwin, of Charles
Waring and Robert Coleman, of Gillingham & Randolph, of Charles
Bennett, of David Thacher, Gamaliel Bryant, Gamaliel Bryant, junior,
Benjamin Barstow and George King, of Charles Bennett, of William
Mason, and of John Cornthwait, thereto annexed, touching the for-
feitures and penalties which, by reason of the importation of certain
merchandise in the ships *Minerva*, *Frederic*, *Concordia*, *Merrimac*,
Marcellus, and brigs *Ann* and *Female*, have been incurred under a
statute of the United States, entitled "An act to interdict the com-
mercial intercourse between the United States and Great Britain and
France and their dependencies, and for other purposes," and a
statute entitled "An act concerning the commercial intercourse be-
tween the United States and Great Britain and France, and for other
purposes," and the statute supplementary to the last mentioned
statute, have been transmitted to the Secretary of the Treasury by
the judge of the United States for the district of Maryland, pursuant
to the statute of the United States entitled "An act directing the
Secretary of the Treasury to remit fines, forfeitures, and penalties
in certain cases," as by the said statements of facts and petitions re-
maining in the Treasury Department of the United States may fully
appear. And whereas, I, the said Secretary of the Treasury, have
maturely considered the said statements of facts and petitions; and
whereas it has been proved to my satisfaction that the goods, wares,
and merchandise, by the importation whereof the forfeitures and
penalties aforesaid have been incurred, were at the time of their
shipment *bona fide* owned by citizens of the United States, and shipped
and did depart from some port or place in the United Kingdom of
Great Britain and Ireland, owned as aforesaid, between the twenty-
third day of June and the fifteenth day of September, one thousand
eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury,
in pursuance of the directions of the said last mentioned statute, do
hereby remit to the petitioners aforesaid all the fines, penalties, and
forfeitures incurred as aforesaid, upon the costs and charges that
have arisen or may arise being paid, and on payment of the duties
which would have been payable by law on the goods, wares, and
merchandise if legally imported; and also do hereby direct the prose-

cution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, and charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-ninth day of June, in the year of our Lord one [L. S.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the seal of the said district court, this second day of October, in [L. S.] the year of our Lord one thousand eight hundred and fifty-seven.

THOS. SPICER,

Clerk of the District Court.

Petitioners.—Thomas Goodwin, Charles Waring and Robert Coleman, Gillingham & Randolph, Charles Bennett, David Thacher, Gamaliel Bryant, Gamaliel Bryant, jr., Benjamin Barstow and George King, Charles Bennett, William Mason, John Cornthwait.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas seven statements of facts, bearing date the seventh day of June, 1813, together with the petition of Luke Tiernan & Co., of Joseph & William Smith, of William King, of John Moss, of Ebenezer & John Breed, of William M. Beall, and of Samuel Hays, thereto annexed, touching the forfeiture and penalties which, by reason of the importation of certain merchandise in the ships Merrimac, Concordia, and brigs Ann and Female, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases,"

as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear. And whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-ninth day of June, in the year of our Lord one [SEAL.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } to wit:
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. S.] seal of the said district court this first day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

Petitioners.—Luke Tiernan & Co., Joseph & William Smith, William King, John Moss, Ebenezer & John Breed, William M. Beall, Samuel Hays.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas seven statements of facts, bearing date the 7th day of June, 1813, together with the petitions of Elisha Brown, of Richard

Norris, of George Grundy & Sons, of Eichelberger & Clemm, of John D. Craig, of Luke Tiernan & Co., and of Schultz & Vogler, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships Merrimac, Female, Marcellus, Concordia, Frederic, and brig Ann, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued, on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-ninth day of June, in the year of our Lord one
[SEAL.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing

is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the seal of the said district court, this first day of October, in [L. s.] the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

Petitioners.—Elisha Brown, Richard Norris, George Grundy & Sons, Eichelberger & Clemm, John D. Craig, Luke Tiernan & Co., Schultz & Vogler.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas six statements of facts, bearing date the 7th day of June, 1813, with the petitions of Crosdale & Gibson, of Alexander Brown & Sons, of Fridge & Morris, of Robert Miller, of Lewin Wethered, and of John Hoffman, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships *Minerva*, *Marcellus*, *Concordia*, *Merrimac*, *Frederic*, and brig *Ann*, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and a statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped and departed from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury, in pursuance of the directions of the last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would

have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued, on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-first day of June, in the year of our Lord one
[SEAL.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } to wit:
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the seal of the said district court, this third day of October, in
[L. S.] the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

Petitioners.—Crosdale & Gibson, Alexander Brown & Sons, Fridge & Morris, Robert Miller, Lewin Wethered, and John Hoffman.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas eight statements of facts, bearing date the seventh day of June, 1813, together with the petitions of Peter Diffenderffer, of McCulloch & Poor, of Blair & Dall, of Thomas and Isaac Edmondson, of Poultney & Thomas, of George Frederick & Jacob Lindemberger, of Prentis & Carter, and of Frederick Jordan, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships *Minerva*, *Marcellus*, *Merrimac*, *Female*, *Frederic*, and brig *Ann*, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secre-

tary of the Treasury to remit fines, forfeitures, and penalties, in certain cases;" as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-first day of June, in the year of our Lord one [L. S.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. S.] seal of the said district court this second day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

Petitioners.—Peter Diffenderffer, McCulloch & Poor, Blair & Dall, Thomas and Isaac Edmondson, Poultney & Thomas, George, Frederick & Jacob Lindenberger, Prentis & Carter, and Frederick Jordan.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting :

Whereas five statements of facts, bearing date the 7th day of June, 1813, together with the petitions of William and David Cochrane, of Henry Thompson, of Charles Warfield, of Derick Keyser, and of Peter Hoffman, thereto annexed, touching the forfeitures and penalties by reason of the importation of certain merchandise in the ships *Minerva*, *Marcellus*, *Merrimac*, *Concordia*, *Frederic*, and brig *Ann*, incurred under a statute of the United States, entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States, entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures and penalties in certain cases;" as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were at the time of their shipment *bona fide* owned by citizens of the United States, and shipped and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury, in pursuance of the direction of the said last mentioned statute, do hereby remit to the petitioners aforesaid, all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also, do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office in the city of Washington, this twenty-first day of June, in the year of our Lord one [L. S.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } *to wit:*

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing

is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. s.] seal of the said district court, this second day of October in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of District Court.

Petitioners.—William and David Cochran, Henry Thompson, Charles Warfield, Derick Keyser, Peter Hoffman.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas four statements of facts, bearing date the seventh day of June, 1813, together with the petitions of George Hoffman, of Richard Ratlien, of McKean & McClellan, and of John Trull, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships *Minerva*, *Marcellus*, *Merrimac*, *Frederic*, *Concordia*, and brig *Ann*, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and were shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecu-

tion or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-first day of June, in the year of our Lord one [SEAL.] thousand eight hundred and thirteen, and the thirty-seventh year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } to wit:
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. S.] seal of the said district court this first day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

Petitioners.—George Hoffman, Richard Ratlien, McKeen & McClellan, John Trull.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas five statements of facts, bearing date the 11th day of September, 1813, together with the petitions of George and Jeremiah Howard, of Joseph B. and William N. Lapsley, of Timothy Wiggin, and two of Robert Halliday, thereto annexed, touching the forfeitures and penalties which by reason of the importation of certain merchandise in the ships *Minerva* and *Concordia*, have been incurred under a statute of the United States, entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States, entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear. And whereas, I, the said Secretary of the Treasury have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties afore-

said have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid, all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington this second day of November, in the year of our Lord one [L. s.] thousand eight hundred and thirteen, and the thirty-eighth year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. s.] seal of the said district court, this second day of October in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of District Court.

Petitioners.—George and Jeremiah Howard, Joseph B. and William M. Lapsley, Timothy Wiggin, and two of Robert Halliday.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas four petitions and statements of facts, bearing date the eleventh day of September, 1813, together with the petitions of Boswell, Morris & Jones, of Thomas Parker, of Hugh Smith, and of McKean & Woodland, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the brig Penobscot and ships Ann and Marcellus, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,"

and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases;" as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this second day of November, in the year of our Lord one [L. S.] thousand eight hundred and thirteen, and the thirty-eighth year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } to wit:

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the [L. S.] seal of the said district court this second day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,

Clerk of the District Court.

Petitioners.—Boswell, Morris & Jones, Thomas Parker, Hugh Smith, and McKean & Woodland.

To all to whom these presents shall come, I, William Jones, Acting Secretary of the Treasury of the United States, send greeting:

Whereas a statement of facts, bearing date the 2d day of December, 1813, together with the petition of Patrick Dunkin, Johnston Henderson, and John Williams, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ship *Frederic*, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases," as by the said statement of facts and petition remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statement of facts and petition; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this eighth day of December, in the year of our Lord one
[SEAL.] thousand eight hundred and thirteen, and the thirty-eighth year of the independence of the United States.

W. JONES,

Acting Secretary of the Treasury.

THE UNITED STATES OF AMERICA, }
District of Maryland, } to wit:

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing

is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof I hereunto subscribe my name and affix the seal of the said district court, this third day of October, in [L. S.] the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

Petitioners.—Patrick Dunkin, Johnston Henderson, and John Williams.

To all to whom these presents shall come, I, George Washington Campbell, Secretary of the Treasury of the United States, send greeting:

Whereas two statements of facts, bearing date the 5th day of March, 1814, together with the petitions of Jaazoniah Gross and of James Pauley, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the ships *Minerva*, *Frederic*, and *Marcellus*, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions; and whereas it has been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on the goods, wares, and merchan-

dise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-eighth day of April, in the year of our Lord
[SEAL.] one thousand eight hundred and fourteen, and the thirty-eighth of the independence of the United States.

G. W. CAMPBELL,
Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } to wit:
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said district court, this second day of October,
[L. S.] in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

Petitioners.—Jaazoniah Gross and James Pauley.

To all to whom these presents shall come, I, George Washington Campbell, Secretary of the Treasury of the United States, send greeting:

Whereas two statements of facts, bearing date the fifth day of March, 1814, together with the petitions of John Berry and of William Ward, thereto annexed, touching the forfeitures and penalties which, by reason of the importation of certain merchandise in the brig Ann and ship Marcellus, have been incurred under a statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and a statute entitled "An act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes," and the statute supplementary to the last mentioned statute, have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the

said statements of facts and petitions; and whereas it hath been proved to my satisfaction that the goods, wares, and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment, *bona fide* owned by citizens of the United States, and shipped and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June and the fifteenth day of September, one thousand eight hundred and twelve:

Now, therefore, know ye that I, the said Secretary of the Treasury, in pursuance of the directions of the said last mentioned statute, do hereby remit to the petitioners aforesaid all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable, by law, on the said goods, wares, and merchandise if legally imported; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of the costs, charges, and duties as aforesaid.

Given under my hand and seal of office, in the city of Washington, this twenty-seventh day of April, in the year of our Lord one [L. s.] thousand eight hundred and fourteen, and the thirty-eighth year of the Independence of the United States.

G. W. CAMPBELL,
Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the [L. s.] seal of the said district court, this third day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

Petitioners.—John Berry and William Ward.

To all to whom these presents shall come, I, George Washington Campbell, Secretary of the Treasury of the United States, send greeting:

Whereas a statement of facts, bearing date the 5th day of March, 1814, with the petition of James Kirby, of Richmond, importer of certain merchandise in the ships *Ann* and *Concordia*, thereto annexed, touching certain forfeitures and penalties incurred under the statute of the United States entitled "An act to interdict the commercial

intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," has been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," as by the said statement of facts and petition remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statement of facts and petition, and it doth appear to my satisfaction that the said forfeitures and penalties were incurred without wilful negligence or any intention of fraud:

Now, therefore, know ye that I, the said Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said last mentioned statute, do hereby decide to remit to the said petitioner all the right, claim, and demand of the United States, and of all others whomsoever, to the penalties and forfeitures aforesaid; and also do hereby direct that the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of costs and duties.

Given under my hand and seal of office, in the city of Washington, this twenty-eighth day of April, in the year of our Lord one [L. s.] thousand eight hundred and fourteen, and the thirty-eighth year of the independence of the United States.

G. W. CAMPBELL,
Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } to wit:
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the [L. s.] seal of the said district court, this second day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of District Court.

Petitioner.—James Kirby, of Richmond.

To all to whom these presents shall come, I, George Washington Campbell, Secretary of the Treasury of the United States, send greeting:

Whereas a statement of facts, bearing date the 18th day of June, 1814, with the petition of William and Henry Scott, importers of certain merchandise in the ships *Minerva*, *Marcellus* and *Merrimac*,

and brig Ann, thereto annexed, touching certain forfeitures incurred under the statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," has been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," as by the said statement of facts and petition remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statement of facts and petition, and it doth appear to my satisfaction that the said forfeitures were incurred without wilful negligence or any intention of fraud:

Now, therefore, know ye that I, the said Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said last mentioned statute, do hereby decide to remit to the said petitioners all the right, claim, and demand of the United States, and of all others whomsoever, to the forfeitures aforesaid; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of costs and duties.

Given under my hand and seal of office, in the city of Washington, this second day of July, in the year of our Lord one thousand [L. S.] eight hundred and fourteen, and the thirty-eighth year of the independence of the United States.

G. W. CAMPBELL,
Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } to wit:
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the [L. S.] seal of the said district court, this second day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of District Court.

Petitioners.—William and Henry Scott.

To all to whom these presents shall come, I, George Washington Campbell, Secretary of the Treasury of the United States, send greeting:

Whereas two statements of facts, bearing date the eighteenth day of June, 1814, with the petitions of George Chapman and of Thomas Wharton, importers of certain merchandise in the ship Minerva,

thereto annexed, touching certain forfeitures incurred under the statute of the United States entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," have been transmitted to the Secretary of the Treasury by the judge of the United States for the district of Maryland, pursuant to the statute of the United States entitled "An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," as by the said statements of facts and petitions remaining in the Treasury Department of the United States may fully appear; and whereas I, the said Secretary of the Treasury, have maturely considered the said statements of facts and petitions, and it doth appear to my satisfaction that the said forfeitures were incurred without wilful negligence or any intention of fraud:

Now, therefore, know ye that I, the said Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said last mentioned statute, do hereby decide to remit to the said petitioners all the right, claim, and demand of the United States, and of all others whomsoever, to the forfeitures aforesaid; and also do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued on payment of costs and duties.

Given under my hand and seal of office, in the city of Washington, this second day of July, in the year of our Lord one thousand [L. s.] eight hundred and fourteen, and the thirty-eighth year of the independence of the United States.

G. W. CAMPBELL,
Secretary of the Treasury.

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland,

I, Thomas Spicer, clerk of the district court of the United States in and for the Maryland district, do hereby certify that the foregoing is a true copy of the release on file among the record and proceedings of the district court aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the [L. s.] seal of the said district court, this second day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS SPICER,
Clerk of the District Court.

Petitioners.—George Chapman and Thomas Wharton.

Statement of certain ships or vessels which arrived at the port of Baltimore, in the State of Maryland, between the first day of August and the fifth day of November, in the year eighteen hundred and twelve, from certain ports in the Kingdom of Great Britain or her dependencies, with the amount which was levied as duties on the goods, wares, and merchandise imported therein, the amount which was received by the collector as for duties, and the amount by him paid or accounted to the United States, and the commissions received by the collector thereon; said statement made out in obedience to special instructions of the Secretary of the Treasury of the date of July 28, 1857.

Date of entry.	Denomination and name of vessel.	Name of master.	Where from.	Amount levied on the cargo.	Amount received by the collector as for duties.	Amount paid by the collector, or accounted for to the United States.	Amount of commissions received by the collector.
1812.							
September 18	Ship Marcellus	W. Ward	Liverpool	\$146, 107 04	\$146, 107 04	\$146, 107 04	\$547 90
September 18	Brig Penobscot	J. Perkins	Liverpool	2, 283 77	2, 283 77	2, 283 77	8 57
October 9	Ship Nancy	J. Chote	Liverpool	2, 384 31	2, 384 31	2, 384 31	8 94
October 7	Ship Concordia	A. Adams	London	83, 626 96½	83, 626 96	83, 626 96	313 60
September 18	Ship Minerva	J. Gross	Liverpool	132, 473 83	132, 473 83	132, 473 83	496 78
October 23	Brig Female	C. Childs	Bristol	2, 910 21	2, 910 21	2, 910 21	10 91
October 24	Ship Frederick	G. King	Liverpool	15, 660 58½	15, 660 59	15, 660 59	58 73
November 4	Ship Merrimac	C. Cooke	Liverpool	32, 748 91	32, 748 91	32, 748 91	122 81
November 4	Brig Ann	J. Page	London	68, 454 18½	68, 454 19	68, 454 19	256 70
				486, 649 80½	486, 649 81	486, 649 81	1, 824 94

DISTRICT AND PORT OF BALTIMORE, October 1, 1857.

The undersigned, collector and naval officer of the district and port of Baltimore, do certify that the above statement is truly made out from the books of record of this custom-house; that the duties therein stated have been collected, accounted for, and paid over to the United States; and that it doth not appear from the said books of record that any part thereof, except so much as is stated therein for commissions thereon, has been paid to James H. McCulloh, the collector, or to any other person or persons on his account.

JNO. THOMSON MASON, Collector. [L. S.]
L. K. BOWEN, Naval Officer. [L. S.]

Abstract from the records of the custom-house, Baltimore, showing the names of the importers, the number of packages by each, the amount of bonds given for duties at the time of entry, and the amount paid for duties on merchandise imported into the port of Baltimore in the following vessels, viz: ship Marcellus, brig Penobscot, ship Nancy, ship Concordia, ship Minerva, brig Female, ship Frederick, ship Merrimac, and brig Ann; made out in obedience to special instructions of the Secretary of the Treasury of the date of the 28th July, 1857.

Importers.	No. of packages each importer entered.	Amount of bonds for duties on the entry.	Amount paid as duties on the merchandise.	Proportion of the am't received treated as for- feitures.
<i>Ship Marcellus, of Boston, William Ward master; from Liverpool; entered September 18, 1812.</i>				
Appleton & Co.....	1	\$211 31	\$211 31	None ----
Baker, William, & Sons.....	9	2,639 21	2,639 21	----do----
Brown, A., & Sons.....	136	11,226 51	11,226 51	----do----
Browne, Elisha.....	2	482 68	482 68	----do----
Booth, William.....	1	-----	35 80½	----do----
Burt, Andrew.....	1	-----	32 56	----do----
Campbell & Ritchie.....	54	3,303 70	3,303 70	----do----
Comegys, Falconer & Co.....	25	3,261 64½	3,261 64½	----do----
Crosdale & Gibson.....	8	7,508 12	7,508 12	----do----
Diffenderffer, P.....	14	148 48½	148 48½	----do----
Edmondson, T. & J.....	138	15,702 15	15,702 15	----do----
Eichelberger & Clemm.....	50	2,902 29	2,902 29	----do----
Fridge & Morris.....	92	9,607 71½	9,607 71½	----do----
Grundy, G., & Sons.....	16	3,046 82	3,046 82	----do----
Heathcote, J.....	120	11,610 43	11,610 43	----do----
Do.....	1	-----	7 56	----do----
Hoffman, G.....	37	2,983 20	2,983 20	----do----
Jackson, B.....	5	440 36	440 36	----do----
Jordan, F.....	17	610 92½	610 92½	----do----
Kimmell & Albert.....	26	1,063 54½	1,063 54½	----do----
Krumber, L., by A. Brown.....	2	-----	46 08	----do----
Lindenberger, G. F., & J.....	143	22,890 77	22,890 77	----do----
McCulloch & Poor.....	53	1,949 24½	1,949 24½	----do----
Miller, Robert.....	25	6,343 09	6,343 09	----do----
Norris, Richard.....	42	3,692 60	3,692 60	----do----
Owings, Joseph.....	6	784 03	784 03	----do----
Parker, Thomas.....	11	754 40	754 40	----do----
Pawley, James.....	7	242 85	242 85	----do----
Poultney & Thomas.....	23	1,823 98½	1,823 98½	----do----
Prentiss & Carter.....	20	190 25½	190 25½	----do----
Robinson, John.....	34	4,153 16	4,153 16	----do----
Schroeder, Henry, & Co.....	44	6,749 71	6,749 71	----do----
Scott, William, & Henry.....	8	1,005 62	1,005 62	----do----
Schultz, Conrad.....	3	654 16	654 16	----do----
Thomas, P. E., & George.....	44	3,826 30	3,826 30	----do----
Tiernan, L., & Co.....	18	2,920 17	2,920 17	----do----
Todhunter, Joseph.....	20	2,891 90	2,891 90	----do----
Ward, William.....	2	183 48	183 48	----do----

ABSTRACT—Continued.

Importers.	No. of packages each importer entered.	Amount of bonds for duties on the entry.	Amount paid as duties on the merchandise.	Proportion of the am't received treated as for- feitures.
<i>Ship Marcellus—Continued.</i>				
Waing, Charles, & Co.	3	\$687 67½	\$687 67½	None
Wethered, Lewin	18	3,125 32	3,125 32	do....
Wilkins, William & Joseph	20	3,387 89	3,387 89	do....
Hoffman, P., & Son	12	979 33	979 33	do....
		145,984 99	146,107 04	
<i>Brig Penobscot, of Penobscot, John Perkins, jr., master; from Liverpool; entered September 18, 1812.</i>				
Perkins, John, jr.	1	-----	58 50½	do....
Smith, Matthew	252	2,118 99	2,118 99	do....
Do	6	-----	2 27½	do....
Smith, Hugh	50	102 00	102 00	do....
Do	1	-----	2 00	do....
		2,220 99	2,283 77	
<i>Ship Nancy, of Baltimore, J. Choate master; from Liverpool; entered October 9, 1812.</i>				
Choate, J.	3	-----	20 28	do....
Hall, W.	295	2,364 03	2,364 03	do....
		2,364 03	2,384 31	
<i>Ship Concordia, of Marblehead, A. Adams master; from London; entered October 7, 1812.</i>				
Allcock, William	9	968 76½	968 76½	do....
Barclay & McKean	16	726 18	726 18	do....
Campbell & Ritchie	30	4,153 75	4,153 75	do....
Cochran, William, & Bros.	1	445 83	445 83	do....
Collet, John	13	-----	127 14	do....
Fleming & Hall	15	2,149 34½	2,149 34½	do....
Fridge & Morris	13	1,745 77	1,745 77	do....
Gault, Thomas, by Ridgely	33	2,464 66	2,464 66	do....
Gillingham & Randolph	11	1,235 63	1,235 63	do....
Hays, Samuel, by J. Gratz	7	573 54	573 54	do....
Hoffman, P., & Son	124	12,704 00	12,704 00	do....
Hoffman, George	242	27,570 42	27,570 42	do....
Hoffman, P., jr.	93	8,817 94	8,817 94	do....
Lapsley, Jos. B.	3	341 22	341 22	do....
Moss, John, by S. Moss.	28	2,519 77	2,519 77	do....
Peck, John S.	14	196 04	196 04	do....
Ramsay, James	2	412 14½	412 14½	do....

ABSTRACT—Continued.

Importers.	No. of packages each importer entered.	Amount of bonds for duties on the entry.	Amount paid as duties on the merchandise.	Proportion of the amount receiv- ed treated as forfeited.
<i>Ship Concordia—Continued.</i>				
Smith, Jos., & Son	64	\$5,570 62	\$5,570 62	None.....
Tiernan, L., & Co.....	89	10,036 84	10,036 84	do.....
Wilkins, William & Jos.....	4	527 67	527 67	do.....
Wethered, Lewin	1	339 68	339 68	do.....
		83,499 80	83,626 96½	
<i>Ship Minerva, of Boston, J. Gross master; from Liverpool; entered Sep- tember 18, 1812.</i>				
Allcock, William.....	1	153 17½	153 17½	do.....
Appleton & Co.....	126	12,830 10	12,830 10	do.....
Appleton & Co.....	2	374 33	374 33	do.....
Appleton & Co.....	67	8,249 45	8,249 45	do.....
Baker, William, & Sons	14	1,546 86½	1,546 86½	do.....
Baker, William, & Sons	10	635 14	635 14	do.....
Brown, A., & Son.....	96	8,693 89	8,693 89	do.....
Browne, Elisha.....	4	1,011 56	1,011 56	do.....
Browning & Brays, jr.....	9	202 64	202 64	do.....
Campbell & Ritchie.....	45	822 21¾	822 21¾	do.....
Cochran & Bro.....	18	3,388 77	3,388 77	do.....
Comegys, Falconer & Co.....	25	5,040 95	5,040 95	do.....
Cornthwait & Carey.....	2	71 43	71 43	do.....
Crosdale & Gibson.....	23	1,938 09	1,938 09	do.....
Edmondson, T. & J.....	57	5,522 26	5,522 26	do.....
Eichelberger & Clemm.....	5		32 77½	do.....
Eichelberger & Clemm.....	1	153 92	153 92	do.....
Ferguson, J. F.....	2	129 51	129 51	do.....
Fridge & Morris.....	8	638 26¾	638 26¾	do.....
Gross, J.....	9	213 25	213 25	do.....
Grundy, G., & Sons.....	177	2,566 39	2,566 39	do.....
Grundy, G., & Sons.....	1		15 86	do.....
Hall, William & Richard.....	3	966 68	966 68	do.....
Halliday, Robert.....	62	2,559 10	2,559 10	do.....
Halliday, Robert.....	25	1,923 58	1,923 58	do.....
Harden, Samuel.....	17	3,171 33	3,171 33	do.....
Heathcote, John.....	65	10,330 32	10,330 32	do.....
Hoffman, George.....	1	217 58	217 58	do.....
Jackson, Bolton.....	60	445 83½	445 83½	do.....
Jenkins, Edward.....	4	316 92	316 92	do.....
Howard, G. & J.....	3	788 84	788 84	do.....
Jordan, Frederick.....	4	647 92	647 92	do.....
Kimmel & Albert.....	8	885 13	885 13	do.....
Lindenberger, G. F. & J.....	33	5,387 98	5,387 98	do.....
McCulloch & Poor.....	24	568 62	568 62	do.....
McKim & Maslin.....	27	899 90	899 90	do.....
Miller, Robert.....	5	827 28	827 28	do.....
Mulliken, B. H.....	15	3,156 69	3,156 69	do.....
Neilson, Jos. C.....	38	926 88½	926 88½	do.....
Owings, James.....	1	217 06	217 06	do.....
Pawley, James.....	1	166 43	166 43	do.....

ABSTRACT—Continued.

Importers.	No. of packages each importer entered.	Amount of bonds for duties on the entry.	Amount paid as duties on the merchandise.	Proportion of the amount receiv- ed treated as forfeited.
<i>Ship Minerva—Continued.</i>				
Poultney & Thomas.....	80	\$2,928 32½	\$2,928 32½	None.....
Rateen, Richard.....	1	209 28	209 28	do.....
Robinson, John.....	13	1,328 60½	1,328 60½	do.....
Schroeder, Henry, & Co.....	48	6,317 19	6,317 19	do.....
Schultz, Conrad.....	5	396 69½	396 69½	do.....
Scott, William & Henry.....	5	485 03	485 03	do.....
Swan, John, & Co.....	1	58 76	58 76	do.....
Taylor, Ben.....	21	1,002 26½	1,002 26½	do.....
Thomas & George.....	29	2,091 28	2,091 28	do.....
Thompson, Henry.....	2	288 41	288 41	do.....
Tiernan, L., & Co.....	27	4,389 00	4,389 00	do.....
Todhunter, Joseph.....	19	3,030 72	3,030 72	do.....
Walker & Co., by Alex. Brown.....	11	263 88	263 88	do.....
Warfield, Charles.....	2	429 95	429 95	do.....
Warfield David.....	31	2,547 02	2,547 02	do.....
Wethered, Lewin.....	11	2,865 20	2,865 20	do.....
Wharton, Thomas.....	3	60 50	60 50	do.....
Wilkins, John, & Co.....	1	270 43½	270 43½	do.....
Wilkins, Wm. & Joseph.....	37	4,646 07	4,646 07	do.....
Wilson & Mulliken.....	23	4,208 82½	4,208 82½	do.....
Yotter, Charles.....	1	18 95½	18 95½	do.....
Blair & Dall.....	1	20 15	20 15	do.....
Norris, Richard.....	63	1,762 75½	1,762 75½	do.....
		132,197 75	132,473 83	
<i>Brig Female, of Baltimore, C. Child master; from Bristol, England; en- tered October 23, 1812.</i>				
Bennet, Chas., by C. Comegys.....	2	437 36	437 36	do.....
Eichelberger & Clemm.....	1	103 40	103 40	do.....
Grundy, Geo., & Son.....	23	309 61	309 61	do.....
Neilson, James C.....	12	79 30	79 30	do.....
Poultney & Thomas.....	1	60 88½	60 88½	do.....
Tieman, L., & Co.....	2,357	1,909 47½	1,909 47½	do.....
West, Richard.....	1	10 18	10 18	do.....
		2,900 02	2,910 21	
<i>Ship Frederick, of New Bedford, George King master; from Liverpool; entered October 24, 1812.</i>				
Bryant, G., jr. °.....		133 50	133 50	do.....
Cooke, Wm., jr.....	15	1,739 15½	1,739 15½	do.....
Comegys, Falconer & Co.....	11	1,472 68	1,472 68	do.....
Dunken & Henderson.....	6	1,377 53	1,377 53	do.....
D'Arcy & Didier.....	15	1,900 74½	1,900 74½	do.....
Goodwin, Thos., by Chas. Johnson.....	5	318 23	318 23	do.....

° A quantity of coal.

ABSTRACT—Continued.

Importers.	No. of packages each importer entered.	Amount of bonds for duties on the entries.	Amount paid as duties on the merchandise.	Proportion of the am't received treated as for- feitures.
<i>Ship Frederick—Continued.</i>				
Janney, Jos., by Thos. Edmondson.	1	-----	\$41 08½	None.....
Janney, John, by G. T. Hopkins..	7	\$312 07	312 07	do....
Jackson, B.	62	476 25½	476 25½	do....
Keyser, D.	46	378 26½	378 26½	do....
Keyser, S.	62	606 06	606 06	do....
McKim, J., jr.	1	-----	16 77	do....
McKeen & McClellan	121	619 77½	619 77½	do....
McKim, Wm. D.	3	182 26	182 26	do....
Miller, Robert	2	404 36	404 36	do....
Mulliken, B. H.	2	269 88½	269 88½	do....
Neilson, J. C.	46	2,837 85	2,837 85	do....
Pawley, John	3	-----	25 09	do....
Smith, Matthew	1	-----	27 50	do....
Tiernan, L., & Co.	1	406 78	406 78	do....
Wilson & Mulliken	3	442 97	442 97	do....
Kimmel & Albert	29	1,671 77	1,671 77	do....
		15,550 12½	15,660 58½	
<i>Ship Merrimac, of Newburyport, Chas. Cook, jr. master; from Liverpool; entered November 5, 1812.</i>				
Appleton, N. W. & C. H.	4,305	7,361 60½	7,361 60½	do....
Baker & Sons	18	1,579 49	1,579 49	do....
Beale, Wm. M., by H. Clagett	1	77 11	77 11	do....
Browne, Elisha	6	702 51½	702 51½	do....
Browning & Bings	1	159 25	159 25	do....
Campbell & Ritchie	6	1,582 98	1,582 98	do....
Comegys, Falconer & Co.	6	1,243 71½	1,243 71½	do....
Cook, Charles, jr.	4	-----	11 22	do....
Edmondson, T. & J.	8	381 01½	381 01½	do....
Eichelberger & Clemm	18	1,054 76	1,054 76	do....
Fridge & Morris	4	361 57	361 57	do....
Goodwin, Thos., by C. Johnson	3	272 69	272 69	do....
Hall, W.	4	-----	33 15	do....
Heathcote, John.	10	1,225 95	1,225 95	do....
Hoffman, George	10	610 06	610 06	do....
Hoffman, Peter, & Son	10	610 06	610 06	do....
Hoffman, Peter, jr.	5	305 25	305 25	do....
Jackson, B.	188	1,525 48½	1,525 48½	do....
Kimmel & Albert	8	69 06	69 06	do....
Maury, Fontaine	1	-----	4 50	do....
McKean & Woodland	74	3,734 10	3,734 10	do....
Miller, Robert	6	1,578 39	1,578 39	do....
Poultney & Thomas	3	216 58	216 58	do....
Robinson, John	1	53 76	53 76	do....
Scott, Wm. and Henry	2	188 87	188 87	do....
Tiernan, L., & Co.	16	2,909 61	2,909 61	do....
Wilkins, John, & Co.	2	211 80½	211 80½	do....
Wilkins, Wm. and Jos.	12	1,478 62	1,478 62	do....

ABSTRACT—Continued.

Importers.	No. of packages each importer entered.	Amount of bonds for duties on the entries.	Amount paid as duties on the merchandise.	Proportion of the amount receiv- ed treated as forfeitures.
<i>Ship Merrimac—Continued.</i>				
Wilkins, Wm. and Jos.	9	\$1,573 33	\$1,573 33	None.....
Williams, Samuel	1,017	1,632 41	1,632 41	do....
		32,700 01	32,748 91	
<i>Brig Ann, of Bath, John Page mas- ter; from London; entered November 5, 1812.</i>				
Allcock, Wm.	11	909 20½	909 20½	do....
Armour & Jenkins	3	193 71	193 71	do....
Bennett, Chas., & Corn. Comegys ..	2	153 27	153 27	do....
Brown, Alex., & Sons	5	710 49	710 49	do....
Do.	4	589 05	589 05	do....
Browne, E.	7	704 86	704 86	do....
Boswell, Morris & Jones	6	650 22	650 22	do....
Brute, M.	1		13 31	do....
Berry, John, by John White	3	299 92½	299 92½	do....
Campbell & Ritchie	28	2,007 74	2,007 74	do....
Comegys, Falconer & Co	1	385 71½	385 71½	do....
Cooper, Wm., by Rigdon	2	52 36	52 36	do....
Crosdale & Gibson	1	412 28	412 28	do....
D'Arcy & Didier	251	39,488 47	39,488 47	do....
Edmondson, T. & J.	2	218 90	218 90	do....
Do.	2		2 20	do....
Gilmer, Robert, jr	1		38 50	do....
Heathcote, John	6	767 87½	767 87½	do....
Hoffman, George	22	1,658 58	1,658 58	do....
Hoffman, P., & Son	35	2,304 62	2,304 62	do....
Hoffman, P., jr	33	2,824 76	2,824 76	do....
Kingston, John	1		22 00	do....
Mason, Wm., by H. Clagett	47	1,401 06½	1,401 06½	do....
McKim & Maslin	1	62 15	62 15	do....
McKim, J., jr	108	405 06	405 06	do....
Miller, Robert	1	247 94	247 94	do....
Peck, John	14	1,515 19½	1,515 19½	do....
Pierce, E. J.	5	296 14	296 14	do....
Poultney & Thomas	1	89 48½	89 48½	do....
Rateen, Richard	2	171 21½	171 21½	do....
Schroeder, Henry, & Co	7	899 01½	899 01½	do....
Schultze & Cogeler	5	598 18	598 18	do....
Scott, Wm. and Henry	10	738 79	738 79	do....
Smith, Jos., & Son	10	1,373 84½	1,373 84½	do....
Thomas, P. E., and George	2	119 02	119 02	do....
Tiernan, L., & Co	14	2,256 94	2,256 94	do....
Todhunter, Jos	4	621 01	621 01	do....
Trull, John	18	1,306 15½	1,306 15½	do....
Thomas, P., by E. J. Cod	3	167 96	167 96	do....
Wethered, Lewin	1	305 03	305 03	do....
Wilkins, Wm. and Jos	13	1,249 64	1,249 64	do....
Grundy, E., & Sons	1	222 31	222 31	do....
		68,374 49	68,454 18½	

DISTRICT AND PORT OF BALTIMORE,
Collector's Office.

I, John Thomson Mason, collector of the customs within and for the district and port of Baltimore, do hereby certify that the foregoing abstracts are truly copied from the books of record of this custom-house.

In testimony whereof, I hereto set my hand and affix the seal of my
[L. S.] office, this first day of October, in the year eighteen hundred and fifty-seven.

JNO. THOMSON MASON, *Collector.*

L. K. BOWEN, *Naval Officer.*

IN THE COURT OF CLAIMS.

JAS. H. McCULLOH, EXECUTOR, *vs.* THE UNITED STATES.

Notes submitted by petitioner's counsel.

The petitioner in this case is the executor of James H. McCulloh, deceased, who was collector of the customs at the port of Baltimore during the year 1808, and up to the year 1836. The claim asserted is for the collector's share of moneys received by the United States upon the remission of certain forfeitures which accrued at the port of Baltimore in the year 1812, under the acts of Congress known as the non-intercourse laws.

The 91st section of the act of Congress of March 2, 1799, entitled "*An act to regulate the duties on imports and tonnage,*" (Statutes at Large, L. & B., vol. 1, p. 697,) directs the mode of distributing all fines, penalties, and forfeitures, to wit: One moiety to the government and the other moiety, in equal proportions, to the collector, surveyor, and naval officer of the port, &c.

The forfeiture in this case was incurred under the 4th section of the act of Congress of the 1st of March, 1809, entitled "*An act to interdict commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes.*"—(Statutes at Large, L. & B., vol. 2, p. 529.) This, with other sections of said act, was re-enacted and continued in force by the 3d section of the act of Congress of the 2d of March, 1811, entitled "*An act supplementary to the act concerning the commercial intercourse,*" &c., &c.—(Statutes at Large, vol. 2, p. 651.)

The 18th section of the act of 1st of March, 1809, provides how the forfeitures and penalties may be prosecuted and recovered, and makes them distributable under the act of 2d of March, 1799. It further provides that they may be mitigated or remitted under the remitting act of March 3, 1797.—(See remitting act of March 3, 1797, Statutes at Large, vol. 1, p. 506.)

In 1812, when the forfeiture in this case occurred, it was in the

discretion of the Secretary of the Treasury to remit the same, under the act of the 3d March, 1797.

Congress subsequently passed the act of the 2d of January, 1813, entitled "*An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties, in certain cases.*"—(2 Statutes at Large, p. 789.) This act deprived the Secretary of his discretionary power, and imposed upon him the obligation to remit the forfeitures, upon the conditions mentioned in this act, in all cases where the necessary facts were proved, "*upon the payment of duties which would have been payable by law on such goods, wares, and merchandise if legally imported.*"

Upon an examination of the acts of 3d of March, 1797, and the 2d of January, 1813, it will be seen that there is a marked difference between them. 1st. The facts to be established under the act of 1797 are not required to be proved under the act of 1813; 2d. No discretion is given the Secretary under the act of 1813; and 3d. The terms of the remission are prescribed by the act of 1813. The act of the 2d of January, 1813, as to any action under it, seems to be in the nature of a legislative remission, applying retrospectively to the relief of forfeitures incurred *before* its passage; and this is a most material circumstance to be borne in mind.

In this case the remission was made under the act of January 2, 1813, operating independently of and differing in its essential provisions from the act of 1797. It possessed the same vitality, and afforded as full a measure of relief without as it possibly could with the act of 1797 still in force. The rights of the parties not being in anywise affected by the act of 1797, we may disregard its provisions entirely in the argument.

The questions now arising are: 1st. What is the nature of the collector's interest in the forfeitures? 2d. How did the remission under the act of 1813 affect the interest of the collector in this case?

Upon the seizure of the prohibited articles the right of the collector to his share thereof became inchoate merely. The judgment of condemnation consummated this right, subject, however, to be divested by the remitting act of the Secretary of the Treasury, under the act of 1797, at any time before the proceeds were received for distribution.—(United States *vs.* Morris, 10 Wheat., 246.)

In the case now under consideration there was no actual judgment of condemnation, but nevertheless the fact of the breach of the law was fully established by the act of the parties in seeking relief under the act of 1813. The relief by that act was granted only to persons who "*had incurred any fine, penalty, and forfeiture, under the act of 1st of March, 1809,*" &c. The petition for relief, therefore, was an admission of the forfeiture by the parties who had incurred it as fully as if the judgment of condemnation had passed. The inchoate right of the collector became consummated upon the establishment of the forfeiture, by the admission of the parties, as complete as if the judgment of condemnation had been rendered. The practice of the Secretary of the Treasury in such cases was not to remit before condemnation, unless the petitioner would admit that the forfeiture

had been incurred.—(See Justice Thompson's opinion on *U. S. vs. Morris*, 10 Wheat., 246.) By this seizure, then, the collector had a right in the property seized to the extent of one-sixth, to be consummated upon establishing the fact of the forfeiture, either by the judgment of the court or the admission of the parties.

How was this interest affected by the remission?

The right of the collector had attached before the passage of the act of January 2, 1813. To concede that the remission in this case divested this right would be to concede to Congress the power that is to operate by legislation upon *pre-existing* rights.

The legislation of Congress upon the subject of remission has always been with a saving of pre-existing rights; and such they have always considered to be the rights acquired by seizure.—(See the evidence of this in the act of March 3, 1797.)

It is well established by repeated decisions of the Supreme Court, that under the act of 1797 the remitting power of the Secretary extended to the interest of the revenue officers, even after condemnation. This construction of the law did no violence to the rights of the seizing officers, because the law was in existence at the time the seizure was made. The rights of the officers attached, subject to the then *existing* right in the Secretary of the Treasury to remit the interest of all parties.

In the present case, however, the rights of the seizing officers had attached prior to the enactment of the law under which the remission was made. And it was not in the power of Congress to operate by legislation upon pre-existing vested rights. The petitioner, however, does not set up a claim to one-sixth of the thing forfeited, but to the proportion which his testator, as collector, was entitled to, of the amount reserved to the government as the condition of the remission, and which the government actually received.

The remission was made upon the condition mentioned in the act of January 2, 1813, viz: "Upon payment of the costs and charges attending the proceedings, and on payment of *duties* which would have been payable by law on the said goods and merchandise if legally imported." Under this remission the government received the sum of \$83,626 95.

We submit that the case of *McLane vs. The United States*, 6 Peters, 404, justifies the claim now asserted.

In that case the forfeiture was incurred before the passage of the act of January 2, 1813, but came not within the provisions of that act for relief. In July, 1813, Congress passed a special act for the relief of the owners, giving to them the benefit of the act of January 2, 1813, except that the amount to be paid should be the same as the duties which would have accrued upon similar goods legally imported, and arriving after the 1st July, 1812, when, by act of Congress, the duties were doubled. This act placed the owners on precisely the same footing, as to the amount to be paid, with those whose cases came under the act of January 2, 1813. The amount paid by them was measured by the rate of duty in force after July 1, 1812. The special act gave relief on precisely the same terms.

The fact of the forfeiture being established, and that it was incurred for the violation of the non-intercourse laws, the reservation cannot be regarded as a mere payment of lawful duties, but must be regarded as a part of the forfeiture reserved out of the proceeds of the forfeited cargo.

In the case of *McLane*, above mentioned, it is clearly stated by Justice Story that, "in point of law, no duties as such can legally accrue upon the importation of prohibited goods. They are not entitled to entry at the custom-house, or to be bonded. They are *ipso facto* forfeited by the mere act of importation. The cargo being prohibited from importation, it is impossible, in a legal sense, to sustain the argument that the importation could be deemed innocent, and the government could be entitled to duties as upon a lawful importation. It was entitled to the whole property by way of forfeiture, and to nothing by way of duties."

"When Congress authorized the remission upon the payment of *double duties*, the latter was imposed as a condition of restitution upon the offending party," &c.

"That duties, as such, could not have accrued, the reservation in point of law was of a part of the forfeiture."

Now the argument of the court in that case rests clearly on the ground that duties, as such, did not accrue upon illegal importations. The reservation was "upon payment of duties which would have accrued, if the cargo had been lawfully imported subsequent to July 1, 1812." The argument holds equally good in this case, for the act of January 2, 1813, operates "upon payment of the duties which would have been payable by law if legally imported." (By adding the words "after the 1st of July, 1812," the acts are identical.)

As the court has decided the principle in *McLane's* case, that the reservation, under such circumstances, was not of *duties*, because none had or could accrue on the forfeited merchandise, so in this, as no duties, as such, did or could accrue, the reservation in point of law, was not of duties as such, but of a *part of the forfeiture*.

But further, the court say, page 427: "If the government had received a gross sum, equivalent to the double duties, out of the forfeiture, as a condition of the remission, there could be no doubt that the collector would have been entitled to his share of the moiety of the sum so reserved." Can it make any difference, in point of law, that the reservation is made by a reference to double duties, as a mode of ascertaining that sum? "The double duties are referred to as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture; and not as a declaration of intention on the part of the government, that they were to be received as legal duties, due upon a legal importation."

So, in this case, we submit, that the reference in the act of January 2, 1813, was to duties merely to ascertain or measure the amount to be reserved, and was not a declaration on the part of the government that they were to be received as legal duties, due and payable upon a legal importation.

Again, in the same case, page 427, the court lays down the general

proposition that "whatever is reserved by the government out of the forfeiture is reserved as well for the seizing officers as for itself, and is distributable accordingly."

The conclusion is therefore irresistible, that as the act of January 2, 1813, did not and could not make legal that which was illegal, that the reservation was not of duties as such, but a part of the forfeiture, measured in amount by the rate of duty; the amount received in this case was received by the United States for the joint benefit of the government and the revenue officers of the port of Baltimore; the petitioner, as executor of the collector, claiming one-third of one-half.

The only remaining question, and the important one to the petitioner is, is the government bound to refund the money which it has received to the use of his testator?

In anticipation of an argument upon the principle of law, "that money paid under a mistake of law cannot be recovered back in a legal action," we submit that, whilst the principle is well settled between individuals, it does not prevail as between the government and its officers, or as between an executive department and its agents acting under its control and direction. The parties in the latter cases do not stand upon an equal ground. The collector holds his position at the will of the Treasury Department. His position is that of an inferior, under the power and disposition of a superior. He acts under a *duress* of power, which for any disobedience may be exercised to his prejudice. The whole relation existing between the Treasury Department and collectors of the customs is different from that existing between individuals. In the latter case each acts independently of the other in the exercise of an unrestrained judgment and with a jealous regard for their legal rights. Not so, however, is it in the other case. It is the custom of the Treasury Department to give instructions to the revenue officers, under the laws which govern their action. The rules of the department and its construction of the revenue laws, from the foundation of the government, have been communicated to the revenue officers through circular letters, and those officers, in the discharge of their official duties, look to their official head for instructions upon doubtful points. The mode of adjusting accounts, the legality of charges, the amount of commission to be paid, the manner of making disbursements, indeed almost every question under the law is construed and interpreted by the department. It is the source of "superior wisdom and authority," which, from the beginning of the government, they have looked to for "an infallible rule" to govern them in their official action. Obedience to the established opinions and instructions of the Treasury Department has ever been regarded as a sufficient indemnity against damage or loss. It is not difficult to point to numberless cases where the government has indemnified its officers for damage sustained in carrying out the instructions or in acting upon the established practice of the executive department under which they are employed, when the instructions or the practice afterwards proved to be illegal.

What was the *settled practice* of the government in relation to the amount reserved in such cases, upon the remission of forfeitures?

We have been unable to obtain the circular instructions or the expressed views of the Secretary of the Treasury upon this subject, but it would seem from the action of the government in the case of McLane (6 Peters) that the reservation was regarded as lawful duties accruing wholly to the government; and such seems to have been the admitted practice of the government by the Attorney General in his argument of that case.—(See pp. 419, 420.)

The government, then, having established a practice in such cases, and having undertaken to give a construction as to the legal effect of its own acts for the guidance of its officers, precludes it, in our view, from taking a technical advantage of the acts of its officers, when those very acts were based and founded upon the practice which the superior department had established for their guidance.

In this case, the money reserved by the remission was received by the collector, and by him, in the perhaps too rigid respect for the established practice or law of the Treasury Department, paid over to the United States. It subsequently turns out that a part of this fund was his own. The "practice of the department," or the law of the treasury, in respect to which he freely paid the money, is decided by the highest legal tribunal to have been erroneous. Will a just government refuse to restore to its officer that which it had innocently, yet illegally, exacted from him in the discharge of his duties?

The policy of the government is opposed to such a principle. The fullest respect should be due from the inferior to the views and instructions of the superior officers of the government, and obedience should never be repaid with injustice.

"While it is not pretended that the command of a superior justifies the tort or trespass of his inferior, still the general policy of the law requires that ministerial officers, and particularly officers of the revenue, should be protected when they have acted in good faith under the instructions of their superior."

Collectors of the revenue are under the direction of the Secretary of the Treasury, to whom the direction and superintendence of the collection of duties is expressly delegated. Sound policy demands that they should respect his instructions. Establish, then, the principle that obedience to instructions from the superior does not constitute an immunity against loss or damage to the inferior officer, and you thereby extend to the inferior officers an unrestrained license to contest with the government in the courts the legality of every instruction under which they may be called to act. Men in all situations desire to act safely, and if their rights cannot and will not be protected in their obedience to the established practice and rules laid down by the department under which they serve, their only safety is to delay action until the courts shall determine for them. It is, therefore, the policy of the government to avoid an endless litigation with its officers, and promptly to repair any losses or damage which they may sustain in their obedience to all instructions, or to the established practice of the department under which they act.

It is not an infrequent occurrence in the administration of the laws that the collectors, acting under the instructions of the Secretary of the Treasury, levy and exact illegal duties from the importer. The importer notifies the collector that he deems the duties illegal, and not to pay over the same. The collector, nevertheless, still acting under the instructions, pays over the money to the treasury. The importer brings his action against the collector, and recovers from him the illegal charges. "The collector in such a case would be in a position to claim indemnity from the government."—(*Elliott vs. Swartwout*, 10 Peters, 154.)

If, in such a case, the collector is, as the court says, in a position to claim indemnity from the government, why not in the present case? The notice given the collector only enables the importer to sustain his action against *him*, and merely negatives the presumption of the assent on the part of the importer to the justice of the demand. The payment, however, by the collector, is voluntary, and against the warning of the importer. But it is made under the rule or established practice of the department, and for this reason alone he is in a position to claim indemnity of the government.

So in this case, the department had decided that the reservation was to be considered as lawful duties. And the "established practice" was, that the whole was to be paid into the treasury as duties. The payment having been made under this "established practice" and decision of the department, the collector was equally in a position to claim indemnity from the government for the loss which, by his obedience to his superiors, he has sustained.

In the case of *Tracey & Balestier vs. Swartwout*, 10 Peters, 98, the Supreme Court again recognizes the doctrine that the government is bound to indemnify the officer for damages sustained by him for illegal acts done under the instructions of a superior.

The rule, we think, applies as well to cases between the government and the officer as to those where third parties are interested. By the payment of money into the treasury under the established practice of the department, erroneously treating the fund as belonging wholly to the United States, the party in this case has been deprived of the share of the fund which subsequently turns out to have been legally his own. By his obedience to the instructions of his superior he has been damnified to that extent; and the government is bound to indemnify him.

BRENT & KINZER,
Attorneys for the Petitioner.

JAMES H. McCULLOH, EXECUTOR, *vs.* THE UNITED STATES.

Supplemental brief of petitioner.

After the brief of the petitioner's counsel was printed and filed, we for the first time obtained the decisions of this court in the cases of *Sturgis, Bennett & Co.*, *The Estate of James Beatty*, &c., &c.

We refer the court to its own opinion in these cases, as applying with peculiar force to the case under consideration, and as conclusive of the question as to the right of the petitioner to recover.

If we properly appreciate the views of Judge Blackford, expressed in his dissenting opinions in the cases above referred to, they do not apply to this case.

His views, as we understand them, were—

1st. That as the importer had paid the money *without protest* it was not illegally received; the law requiring from the importer a protest, as a condition on which he may sue for the duties.

2d. That, as the act of 26th February, 1845, barred an action against a collector by an importer for duties paid without protest, and that as such a suit against a collector is in substance a suit against the United States, the action brought in the Court of Claims was also barred by the said act of 1845.

We submit that the rights of the parties in this cause are in nowise affected by the act of 1845, however applicable the same may be to suits instituted by importers (in the absence of a protest) for duties.

BRENT & KINZER,
For the petitioner.

IN THE COURT OF CLAIMS.

JAMES H. McCULLOH, EXECUTOR, *vs.* THE UNITED STATES.

In addition to the evidence on file in this cause, comprising the papers from the custom-house and United States district court, we submit the following in proof of the allegation of the petition, "That the money so paid was, by the said James H. McCulloh, collector as aforesaid, *in accordance with the then settled practice of the Treasury Department*, accounted for and wholly paid into the treasury of the United States in the same manner as lawful duties were accounted for and paid."

We arrive at the practice of the department from its cotemporaneous views and acts in respect to these forfeitures.

The Executive department always treated these prohibited importations as *dutiable*.

In the President's message, November 4, 1812, it is stated that "the revenues for the ensuing year will be augmented by THE DUTIES on the late unexpected importations from Great Britain."

The Secretary of the Treasury, in his report of December 1, 1812, says "that the revenues arising from importations amount to the sum of \$12,500,000, of which sum \$5,500,000 arise *from duties* on the late importations from Great Britain."

Having thus been improperly regarded as *dutiable* importations, the 865th article of the Treasury Regulations was erroneously applied to them, and, under that regulation, the amounts paid under the remissions were accounted for and retained *as duties*.

The views and practice of the department in such cases are further shown by the case of *McLane vs. The United States*, 6 Peters.—(See argument of the Attorney General in that case, p. 419.)

The Secretary of the Treasury claimed the right to remit the share of the forfeitures which would otherwise fall to the officers of the customs, and to retain the other half, or to remit it on different terms. (See his letter to Committee of Ways and Means, vol. 8 American State Papers, and 2d on Finances, 12th Congress, 2d session, p. 570, No. 379. See also, as to the views of the department on the subject of forfeitures under the non-importation acts and the prosecution of the forfeitures, Gallatin's letter to Committee of Ways and Means, November 12, 1812; Gallatin's letter to Committee of Ways and Means, November 23, 1812; Comptroller's letter to district attorneys, May 15, 1812; and a subsequent letter of Comptroller to district attorneys. The above letters are to be found in 8 American State Papers, p. 570, No. 379.)

The legislation on the subject will be found in 3 Niles' Register, pp. 222, 239, 255, 272.

A succinct history of the legislation and the course of the department on the subject is found in the Historical Register, 1812-'13, vol. 1, p. 59.

BRENT & KINZER,
Attorneys for Petitioner.

IN THE COURT OF CLAIMS.

ON THE PETITION OF JAMES H. McCULLOH, EXECUTOR OF JAMES H. McCULLOH, DECEASED.

Brief of the United States Solicitor.

The grounds on which this claim is placed are that certain merchandise was forfeited because imported in violation of the 4th section of the act of March 1, 1809, (2 Stat., p. 529,) prohibiting trade with England, as re-enacted by the 3d section of the act of 1811, (Ib., 651;) that the merchandise was seized as forfeited at the instance of claimant's testator, who was then collector of the port of Baltimore, on the 7th of October, 1812, but before the same was condemned and the proceeds distributed the act of January 2, 1813, (2 Stat., p. 789,) was passed, and the forfeiture was remitted under that act, on payment of costs and duties by the importers. It is claimed that one-half of the sum of \$83,626 95, which was received by the collector *as duties* on account of this merchandise, and which was paid by him into the treasury as duties, was paid by him under a mistake of the legal rights of the officers of the customs, as since ascertained by the decision of the Supreme Court in the case of *McLane vs. The United States*, (6 Peters, 404,) which decision, it is contended, declares that

what the act of January, 1813, calls *duties*, was, in fact, *a part of the forfeiture*, and was received as such by the collector, and was therefore subject to distribution according to the 91st section of the act of March 2, 1799, (1 Stat., p. 697;) wherefore the petitioner claims one-sixth of said amount, or the sum of \$13,937 65.

It appears by Mr. Gallatin's report, as quoted in Mr. Attorney General Taney's brief in *McLane's case*, that the merchandise, &c., relieved from forfeiture by the act of January 2, 1813, amounted to eighteen millions, and that the duties received on this merchandise amounted to five millions; so that on the question presented by this case the sum of two and a half millions is depending.

It is a question, therefore, of great importance. I should not, however, have thought the construction of the act of 1813, upon which it depends, was one upon which there could be a serious controversy, but for the decision on which the claimant relies.

The language of the act of January, 1813, which bears on this question, is as follows: "In all such cases * * the Secretary of the Treasury is hereby directed to remit all fines, penalties, and forfeitures that may have been incurred under the said acts, in consequence of such shipment, importation, or importations, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on such goods, wares, and merchandise if legally imported."

The law, it will be observed, is peremptory in requiring the Secretary to remit "*all fines, penalties, and forfeitures*" in such cases, on payment of costs and "on payment of the duties which would have been payable by law on such goods, wares, and merchandise if legally imported." Is there in these words anything to distinguish the *duties* which it lays on the merchandise referred to in the act, from the duties imposed by other acts; or was there anything in the circumstances of the case to prevent the imposition of such duties? The act simply imposes the ordinary duties, instead of the forfeiture which had been incurred.

The customs officers have never claimed the right to divide with the government the *duties* levied under any other act but this, and it is only by transforming what this law expressly calls *duties*, and unquestionably meant to impose, collect, and dispose of as duties, into a different thing *by construction*, that such a right can be maintained under this act. The duties imposed by a similar act are construed to be forfeitures, because the government, says the Supreme Court, (6 Peters, p. 427,) "was entitled to the whole property by way of forfeiture, and to nothing by way of duties; when, therefore, Congress authorized the remission upon the payment of double duties, the latter was imposed as a condition of restitution upon the offending party." And on the same page it is said: "It has not been pretended that the act of the 29th of July, 1813, could divest the rights of the collector antecedently vested in him by existing laws; and if such a doctrine could be maintained at all, it would still be necessary to establish that there was an unequivocal intention on the part of the government to remit his share and to retain its own share of the forfeiture. Such

an extraordinary exercise of power ought to be evidenced by terms susceptible of no doubt. We are of opinion that the present act neither justifies nor requires any such construction. The double duties are referred to as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture, and not as a declaration of intention on the part of the government that they were to be received as legal duties due upon a legal importation."

This is the whole of the reasoning in the case, and the amount of it is, it is assumed that no duties could accrue on goods, the importation of which was prohibited, and therefore the provision of the law for the payment of what it calls duties must be treated as a reservation of a part of the thing forfeited; and as the officers were entitled to one-half of all forfeitures, they were entitled to that portion of what was reserved out of these.

Why is it that the government could not in such cases exact the ordinary duties payable on merchandise lawfully imported, instead of the forfeiture?

The argument of Mr. Sergeant, page 413, whose conclusions were adopted by the court, is, that "no duties were, by law, payable upon those goods. No duties could accrue upon them. Duties by law accrue and are payable only upon goods imported according to law. No duties are or can be payable upon goods brought in contrary to law, and in violation of law; they cannot be for the most obvious and conclusive reasons. Duties accrue not upon arrival in the United States, but upon arrival at the *port of entry*."—(United States *vs.* Vowal, 5 Cranch, 368; Arnold *vs.* United States, 9 ib., 104; S. C. 1 Gall., 348.)

"But forfeiture to the United States also accrues, at latest, immediately upon arrival in the United States, and before arriving at the port of entry. No matter when the seizure took place, it has relation back to the time of offence committed, and overreaches a *bona fide* sale."

The reason given by Mr. Sergeant, which is the only reason given in the report of this case why no duties can be imposed on goods, the importation of which is prohibited, is, that forfeiture accrues on arrival in the United States, and duties do not accrue till arrival at port, or, in other words, the property becomes the property of the United States, and is not, therefore, subject to duty when it comes into port.

I admit that "a forfeiture attaches *in rem* at the moment the offence is committed, and that the property is instantly divested," and becomes vested in the United States; and I also admit, that whilst the property *continues* in the United States no duties could accrue; but the *remittur*, like "the seizure, has relation back to the time of offence committed;" and when the property is thus restored, it is subject to all the incidents of ownership by the importer *as from the time of such reinvestment of property* in him. Sales and all other intermediate dispositions of it, or liens upon it, are affirmed by the *remittur* to the same extent that they are divested by the seizure, condemnation, &c.; and, therefore, if the law of 1813 had not ex-

pressly imposed the duties on this merchandise, the duties imposed in this case would have accrued on the *remittur* as an incident to importation under the general law imposing duties, and such duties might have been lawfully exacted on the merchandise as *the condition precedent* to the delivering of it to the importer. Would the importer in a suit for the goods, or for the recovery of duties paid under protest under such circumstances, be allowed to say that no duties were payable because the goods were imported in violation of law, which subjected them to forfeiture, and the government having remitted the penalty affixed to such an offence, the goods became vested in the importer discharged of all claims? I think not. The answer would be, that the law imposes the duties upon all goods which are imported, and there is no exception, either express or by implication, as to those which are illegally imported, which may become forfeit, but which are not proceeded against and actually forfeited. There is no express exception even of goods which are actually forfeited, the possession of which is retained till sold by the marshal; but the exception arises by implication in such cases, because the goods become the property of the government before duties accrue, and property of the government is not subject to duty; and as they continue to be property of the United States, and are not afterwards parted with to the importer or to any one else, as *of the time at which the forfeiture* was incurred, duties cannot accrue in such a case. In such a case the law does not apply, because the reason of the law is inapplicable. But if the forfeiture is remitted or not prosecuted, both the words and reason of the law require that duties should be paid.

If, therefore, Mr. Sergeant's own mode of reasoning be pursued, there is no legal impossibility in the proposition that duties may accrue on goods, the importation of which is prohibited by special act, when the forfeiture imposed by such act is remitted, and the importer fully reinstated in the property in said goods. As the only reason assigned why the goods were exempt from the duties which the law imposed on similar goods was the ownership of the government, the release of such rights by the government would remove that obstacle.

If, therefore, the act in question does in fact release the forfeiture or the rights which the government acquired under the special law which imposed such forfeiture, it is not material to inquire whether the act authorizing such release had the effect of legalizing the importation. It is enough for the purposes of this case, and to answer the argument relied on, if the purpose of the act was to divest the government of its rights in this property as a forfeiture, and to exact only the duties payable under the general law, which all owners of such property were bound to pay the government on importing it into the United States. This is what the act before us professes to do. If it were universally true that goods illegally imported were exempt from duties, it would be certainly an abuse of terms by Congress to speak of the payment required in this case as a payment of duties, and such payments, whatever they might be termed in the law, must be deemed forfeiture.

But if, on the other hand, duties can be collected, and are in fact collected on prohibited goods, it certainly is the duty of the court to consider as duties what Congress has called by that name. I have shown the reasoning adopted in *McLane's* case, that if the government released the forfeiture, and reinvested the importer in the ownership, duties might accrue. The act of 1813 releases the forfeiture on payment of the ordinary duties, which, as I have shown, is equivalent to an absolute release of the rights of the government in virtue of the forfeiture; and the requirement of payment of duties expresses merely what the law would imply as the consequence of the extinguishment of the right by forfeiture, viz: the revival of the right to duties. But it is argued, from the form of the sentence, that this payment of the duties was required *as a condition*. This is immaterial. This act, like other acts, professes to exact the payments as duties, and this they undoubtedly were, if Congress could, under the circumstances, exact duties, because the payments are expressly so called.

I have shown that, even consistently with the reasoning in *McLane's* case, duties should be collected when the forfeiture was remitted, and accrued by the extinguishment of the right by forfeiture. But I shall now show that, *in this case*, according to the practice of the government, which has been sanctioned by the Supreme Court, duties would have been due in any event, and belonged to the government exclusively.

The petition states: "That on or about the 7th day of October, 1812, information was filed against said merchandise in the district court of the United States for the district of Maryland, and the necessary proceedings taken to enforce the said forfeiture. That the claimants of said merchandise appeared and filed their answers, and prayed that said merchandise should be delivered to them. Whereupon the said court caused the said merchandise to be appraised, and the same delivered to the respective claimants, who executed their bonds with security to the satisfaction of the court for the appraised value of the merchandise, *they having previously secured the payment of the duties on said merchandise in like manner as if the same had been legally entered*. That the *duty bonds* so delivered by the said claimants of said merchandise, with the sum of \$127 14 which was paid in cash, amounted to the sum of \$83,626 93, being the amount of duties which would have accrued upon said merchandise if the same had been lawfully imported."

The 865th article of the treasury regulations requires that, "before merchandise under seizure can be delivered to the claimant on bond under the 89th section of the General Collection law of 2d March, 1799, the certificate of the collector that the duties on such merchandise *have been paid*, must be produced." Until cash payments for duties were required, it was certified in such cases that the duties had been "*secured*," and it appears by the petition that the duties were thus "*secured*" by bond in this case.

Article 865 further provides that "these duties *belong to the United States*, and must be retained in the treasury, whether the merchandise be decreed forfeited or not."

The Supreme Court of the United States, in the case of *Hoyt vs. United States*, 10 Howard, at p. 137, also says: "*Duties thus paid constitute no part of the proceeds of the goods forfeited, in which only the collector has an interest.*" The proceeds are the appraised value secured by the bond, or, in case no bond be given, the amount derived from the sale by the marshal. The payment of the duties is a condition to the acceptance of the bond, and is the voluntary act of the claimant. They do not enter into the question of condemnation, nor constitute any part of the forfeiture declared by the act or the judgment of the court." The question thus decided in Hoyt's case is the exact question presented by this case. In both a claim was set up by a collector for duties received by the government on account of forfeited goods which had been paid in one case in cash, and were secured in the other by bond before the goods were delivered up on another bond for their appraised value, and which therefore according to this decision belonged to the government in any event.

The court say, indeed, that Hoyt's case, "is not like that of *McLane*; there the sum in controversy was reserved out of the forfeiture by the act for the relief of the owners, and was *regarded by the court* as part and parcel of it. The only doubt that existed was, whether or not the amount thus reserved should be considered the legal duties belonging to the government or a portion of the forfeiture, the residue of which had been remitted. The amount was to be equal to the double duties imposed on goods imported under certain circumstances by an act passed since the forfeiture accrued; and *the court was of the opinion* that duties mentioned in that act were referred to simply as a measure to determine the sum to be reserved, and not as duties in the common acceptance of the term."

The mode here adopted of setting forth *McLane's* case is very significant. "*The court regarded*" the amount reserved as part and parcel, &c. "*The court was of opinion that duties mentioned in the act were referred to simply as a measure to determine the amount to be reserved,*" &c. This signifies that the court, whose opinion Judge Story gave, thought so—not the court whose opinion Judge Nelson gives; as much as to say, we take their description of the case before them, and set forth in that way what they decided. This may not be regarded as the expression of dissent from the opinion in *6 Peters*, but it certainly intimates no concurrence in the views which the opinion given by Judge Nelson is so particular to set forth as the views of the court as given by Judge Story. However this may be, there is, at least, an irreconcilable difference in the decisions on one point, and that the only material point in this case, viz: whether *duties* as such could be collected on forfeited goods. In *6 Peters* it was held that duties as such could not be collected on forfeited goods; that the government was entitled to the whole as forfeiture, and to *nothing* by way of duties; and hence it was inferred that whatever was received must be forfeiture, in which the officers were entitled to share. But in Hoyt's case the court say, that where goods were seized as forfeited, and prior to bonding them for their appraised value, payments were made as for duties, those payments were no part of the forfeiture.

The whole question here is, whether duties as such can be collected

on forfeited goods. In 6 Peters, what the law expressly calls duties are converted into forfeiture, because duties as such cannot be collected when forfeiture is incurred. In Hoyt's case precisely the reverse is held as respects duties which were collected on goods which had been actually forfeited, and they were held to be duties notwithstanding the forfeiture. How does that case differ from the present? If the proceedings had gone on in this case, and the goods had been condemned and sold, the proceeds of the bond given for them would have been divided. Hoyt's case decides that there would then have been no claim for any part of the duties paid. Do the duties which were paid or bonded at the time the goods were bonded, become forfeiture by the fact that before the goods are condemned, or the proceeds of the bond given for them are received for distribution, *the forfeiture* was remitted? If the duties are not a part of the forfeiture in one case, how can they become so in the other? In Hoyt's case the court declares that "the duties constitute no part of the proceeds of the goods forfeited," and are not "part of the forfeiture. The payment of the duties is a condition to the acceptance of the bond and re-delivery of the goods."

The case at bar was precisely similar in all respects, as the petition shows, except that a *bond* for the duties was given instead of a cash payment being made at the time of the re-delivery of the goods. This was as distinct from the bond given for the appraised value, as the cash payments in Hoyt's case, and was no more part of the forfeiture than the cash paid, and was, like that cash, according to this decision, and according to the treasury regulations, the exclusive property of the government, "whether the merchandise be decreed forfeited or not."

The ruling in McLane's case, that no duties, as duties, could accrue on forfeited goods, is not sustainable by the reasoning which led to it, where the forfeiture was remitted and the property re-invested in the importer, as in this case; and is overruled by Hoyt's, on the turning point in this case, that the payments made, as for duties, preliminary to bonding merchandise seized as forfeited, were not part of the forfeiture.

Let us now examine the reason avowed by the court in McLane's, as the ground for resorting to the strained construction to which it had recourse to set aside the plain meaning of the act of Congress, as it was understood at the time of its passage by McLane himself, (see his Protest, 6 Peters, 408,) by McCulloh, and by every one else.

The court says: "It has not been pretended that the act of July 29, 1813, could divest the rights of the collector antecedently vested in him by the existing laws; and if such a doctrine could be maintained at all, it would still be necessary to establish that there was an unequivocal intention on the part of the government to remit his share, and to retain its own share, of the forfeiture. Such an extraordinary exercise of power, if it could be maintained, where it is subversive of existing rights, ought to be evidenced by terms susceptible of no doubt. We are of opinion that the present act neither justifies nor requires any such construction. The double duties are

referred to as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture," &c.

By reference to the protest of McLane it will be seen, however, that he protested against granting the prayer of Girard because he alleged "that the right and interest thus vested in him by virtue of said seized forfeiture and sentence of condemnation *in the said moiety of the said ship and her cargo was absolute and indefeasible*, so long as the said sentence of condemnation remained in force; so that by *no act of Congress* passed subsequently to the said sentence and condemnation could such his right be affected, impaired, or divested."

McLane therefore thought "there was an unequivocal intention on the part of the government to remit his share" by the act of July 29, but insisted that his right "*was absolute and indefeasible*," and, therefore, Congress could not *affect, impair, or divest* it. McCulloh, and all others interested, not only thought it was the unequivocal intention of Congress to remit their share by the act of January 2, but did not question the power of Congress to do so, and paid over what that law called *duties* as they paid other duties, without claiming to divide them with the government. The process for converting them into part of the forfeiture was not invented till after the decision in 10 Wheat., of *The United States vs. Morris*, p. 246, when it was found necessary to abandon the position previously taken, that Congress had no power to do what it professed to do in the act of July, 1813, and take the position that if it had such power, the exercise of it was so subversive of existing rights that it ought to be evidenced by terms susceptible of *no doubt*, and that the terms were not sufficiently explicit to justify the opinion that Congress intended to subvert such rights. But this change of position is merely *apparent*. The reason which governs the result is the same—the vested rights of the officers. The difference consists merely in a change in the mode of applying it. In his protest it is because these rights are vested that Congress cannot remit the forfeiture by an act which it was conceded on all hands had that object in view. After the Supreme Court decide in *Morris*' case, on a construction of both the act of 1799, as well as that of 1797, that such rights, according to the law which created them, are not *absolute* till the money is received for distribution, and that they might have been remitted by the Secretary of the Treasury under the act of 1797 at any time previously, without further legislative authority, it is then contended that the act of 1813 had been improperly construed by himself and everybody else, because Congress could not have intended to release *existing* rights, founded on meritorious services, &c.

In the first instance the act is nugatory, because Congress could not divest such rights; and in the end it is nugatory, because it is not to be supposed that Congress would do such a thing.

By this process, twenty years after the act went into effect and received universally the construction then given by McLane, it is discovered that this was erroneous; and that during the war, and at its gloomiest period, when our financial embarrassments were at their height, Congress gave the customs officers two and a half millions of

dollars collected as duties. It is not said that Congress actually intended this; but it is said that to suppose that Congress did not intend it would be a reflection on that body, and the court must give a different construction to the law from that which it received for twenty years after it was passed, for that reason.

The basis on which all the reasoning in support of the claimant's case rests is, that the customs officers, had certain rights in the forfeitures, even prior to the receipt of the proceeds for distribution, which the government was bound to respect. It is not avowed, indeed, that it is not contended that the government could not release the forfeitures at any time before the receipt of the money for distribution, but this will be found to be the purport of what is asserted when the propositions are examined.

Morris's case is cited with approbation, and it is admitted that the government may release &c., but this qualification is added, that the government cannot release the share of the officers, and retain its own share of the forfeiture. But does the government retain its own share of the forfeiture in this case whilst releasing that of the officers? Not unless the duties constitute such a share, and are a part of the forfeiture; and the whole question in the case is whether the duties are a part of the forfeiture. It is, therefore, begging the question to say that the government retains its own share, or any part of the forfeiture.

There is, therefore, nothing left to consider in the argument, except the grounds upon which the natural and accepted construction of the act at the time of its passage, and for twenty years afterwards, was abandoned; or why it is supposed that such a construction involved a disregard of rights, which it was inadmissible to suppose Congress intended to divest; in other words, the *nature* of rights, which are not vested or recognizable in law, but yet are so sacred. It is not pretended that these officers had any but what are called *inchoate rights*, or any which could not be remitted by Congress; but, nevertheless, it is said, "the duty of the collector in superintending the collection of the revenue, and in making seizures for supposed violations of law, is onerous, and full of perplexity. If he seizes goods it is at his own peril, and he is condemnable in damages and costs if it shall turn out, upon final adjudication, that there was no probable cause for the seizure," &c.

What are described on page 426 as "*inchoate rights*," and on page 428 as "*existing rights*," are thus supposed to be founded on service attended with perplexity and risk, and they are therefore, such rights as that whilst the courts admits that Congress *may* release them, yet such a release, says the court, must be "evidenced by terms susceptible of no doubt." But in the case of Morris the court say, at page 99, (6 Cond. R.,) that "the forfeiture is to the United States," and that the 91st section of the act of 1799, "creating the right of the custom-house officers, does not vest any absolute right in them until the money is received" (for distribution); and, speaking of the act of 1797, says, "the law was made for the benefit of those who had innocently incurred the penalty, and not for the benefit of the custom-

house officers." This applies equally to the act of 1813. Nor does the date of the act for the remission of the forfeitures, or the reasons which may have induced its passage, affect the question. As the forfeiture is to the United States, and the rights of the officers under the act of 1799 are but a *conditional* interest, which is no interest at all till the condition attaches, it follows that the United States may, by law, at any time before the actual receipt of the money for distribution, prevent the consummation of the right by remitting the forfeiture, or by making any other disposition of the subject which Congress should deem just and proper.

In the case of *Morris*, the court does not consider the nature of the interest allowed to the officers, but Mr. Justice Johnson, in his separate opinion, says it is "a *mere boon* from the government, which they may *justly*, and do practically, reserve a sovereign control over till so paid under their laws. The gift is from them of a thing forfeited to them, and they may modify and withdraw that gift *ad libitum*."

But the court decides the question on a construction of the statutes, and does not give an opinion on the question whether the interest of the officers is to be regarded as a *mere boon*, as Justice Johnson regards it, or whether it is compensation for the trouble and risk attending the seizures, as it seems to be considered in *McLane's* case. The point is a debatable one. Justice Johnson, it seems to me, was right, because the risk and trouble to the officers attending seizures, upon which the opposite opinion is founded are practically, altogether nominal. They are not subject to damages at all except where the seizures are judged to have been made without probable cause, which can rarely happen, and when it has happened the damages have, in all cases, I believe, been paid by the United States. The object of the law in allowing a large part of the forfeiture to the officers, was to give them an *interest* to enforce the law, and to put it out of the power of importers to secure their connivance in violating it. It was, as Justice Johnson expresses it "a *boon*," made on purpose much larger in amount than an importer could afford to give, in order to outbid him, and thus to put the *amount* of the *boon*, as well as official duty, on the side of the government.

But as respects the decision of the question before the court, this question is entirely immaterial, and, therefore, the reserve of the court in *Morris'* case in respect to it was appropriate. As it is admitted that the law gave no vested interest to the officers till the money was received for distribution, and therefore no interest which the court could take notice of, the motives in the minds of the legislators for giving it then, and withholding it till then, were equally beyond the knowledge of the court, and all reasoning about them was merely speculative, and certainly authorized no construction of the words of the law itself at variance with the ordinary and accepted signification of its language.

But in *McLane's* case it has not only been assumed that the share of the forfeitures granted the customs officers is as compensation for services attended with risk and perplexity, but for this reason the court declares that no act of Congress will be permitted to subvert the "ex-

isting rights' founded on such service, if any other construction can be given to the law; and when this declaration is considered in connexion with the law actually before the court, which McLane himself and every one else had construed for twenty years as designed to release, or, as the court expresses it, to subvert such rights, it is tantamount to saying that no form of language could be used which would be so construed by the court.

It is plain, therefore, that what is merely termed in this opinion an existing or inchoate right receives in fact the consideration of a vested right, the case of Morris to the contrary notwithstanding; and that whilst the authority of Congress is admitted in form, its act is in fact set aside by the refusal of the court to give it the *construction* which the language used requires.

I have shown, I think, that the decision in McLane's case, when since brought to the attention of the court in Hoyt's case, was not approved. The dissatisfaction with the course of reasoning adopted in the former case is apparent in every line of the statement of that reasoning in the latter: and on the only material point to the decision of this case, that duties as duties may be received on forfeited goods, and that they are no part of the forfeiture in which the officers share, I think the decision in McLane's case is directly overruled; or if not, and there be any distinction between the cases which renders the rulings consistent, then I insist that the same distinction exists between this case and McLane's.

But although I have given so much space to the consideration of the opinion in McLane's case, and have attempted to show that it was overruled in Hoyt's case, I have done so altogether out of consideration to the deservedly great weight due to the opinions of the court from the talent and learning of the judges, and not because the decisions are obligatory here as in courts from whose judgments an appeal may be made to it. There being no appeal from the decisions here to the Supreme Court, the judges of this court are obliged to be governed by their own opinions in their judgments, however much they may defer to the opinion of that court, or should wish to accord with it in opinion. This case illustrates the mischief which would arise from any other course.

If the court should not agree with me in thinking the case of McLane overruled in the essential point affecting this case by the decision in Hoyt's case, and should relinquish their own opinions on the law in deference to what they may think was ruled in McLane's case, there would be in fact no decision on the law of the case by any court, because, as we have not the right of appeal to the Supreme Court to know whether its real opinion on the law had been followed, we should have only the judgment of this court as to what the opinion formerly was, as derived from two other cases. There might be a mistake as to the former opinion, or, if not, that might not be the opinion which the Supreme Court would now pronounce.

I also rely on the settlement of McCulloh's account with the treasury, made under a full knowledge of all the facts of the case as now presented, as a bar to this claim. I have labored this point heretofore

fully in the case of David Wood, claiming the return of moneys paid for duties without protest. I make my brief in that case a part of this. The ground on which a majority of the court differed from me in that class of cases, that the payment was exacted as a condition precedent to the delivery of the goods, does not exist here. It is said in argument by way of making out a case of duress, however, that being under the orders of the Secretary, the officer was obliged to pay over the duties or he might have lost his office, &c. But this, even, is not *alleged* in the petition. As there presented, it is simply a payment into the treasury of money which would not have been made if McCulloh had known as much about the law then as since McLane's case was decided, and for aught that appears in the petition, or, for that matter, even in the argument, he was quite as much at liberty to present *the claim* then, if not retain the money, as at this time. Nothing done by the government or by individuals could be considered settled without the aid of this principle. And for this reason such settlements are on the footing of *res judicata*.

M. BLAIR.

JAMES H. McCULLOH, EXECUTOR OF JAMES H. McCULLOH, DECEASED, *vs.*
THE UNITED STATES.

Judge BLACKFORD's opinion.

The petition in this case contains the following statements :

1. That the testator was collector of the customs for the district and port of Baltimore, in the State of Maryland from 1808 until the time of his death, in 1836, and as such collector was entitled to a certain part of certain fines, penalties, and forfeitures incurred at said port during his term of office.

2. That between the 1st of August and the 31st of December, 1812. the testator, as such collector, seized to the use of the United States as forfeited, a large quantity of merchandise, which had been at certain times in 1812 imported into said port in certain ships in violation of certain acts of Congress mentioned in the petition.

3. That informations were filed against said merchandise in the district court of the United States for the district of Maryland, to which informations the claimants of the merchandise filed their answers; that the merchandise was appraised and delivered to those claimants who executed their bonds for the appraised value, having previously executed duty bonds as if the merchandise had been legally imported, which duty bonds and the cash paid for duties amounted to \$486,649 80, being the amount of duties which would have been payable on said merchandise had the same been lawfully imported.

4. That subsequently to those proceedings, the claimants of the merchandise petitioned the judge of said court for a remission of said forfeitures; and the petition and a certain statement of facts having been transmitted by the judge to the Secretary of the Treasury, the

Secretary, in accordance with the act of Congress of the 2d of January, 1813, entitled "An act directing the Secretary of the Treasury to remit fines, penalties, and forfeitures in certain cases," remitted all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges being paid, and on payment of the duties which would have been payable on said merchandise if legally imported.

5. That said remissions were granted before the rendition of any judgments of forfeiture; that in accordance with the reservation in the remissions, the said petitioners to the judge paid said costs and charges, and also paid the bonds which had been given as for the duties on said merchandise; that the money so paid, which amounted to \$486,649 80, was, by said collector, accounted for and paid into the treasury of the United States in the same manner as lawful duties were accounted for and paid.

6. That therefore the said collector in his lifetime, and his executor since, was entitled to one-sixth of the money received by the United States aforesaid, which one-sixth amounts to \$81,108 30.

The evidence shows that the sum of \$486,649 81, paid into the treasury, was the amount levied on the merchandise as duties, and was paid into the treasury as duties, and that the testator, as collector, received thereon his commissions, amounting to the sum of \$1,824 94.

This suit is brought to recover back from the United States one-sixth part of the money paid into their treasury as aforesaid.

My opinion is that the suit cannot be sustained. The money was voluntarily paid by the testator, and received in good faith by the United States, with a full knowledge by both parties of all the facts connected with the case, and with the belief, so far as we are informed, that the amount was, as duties, legally due to the United States. The amount so received by the United States was the sum to which they would have been entitled as duties, and the amount received by the testator was the sum to which he would have been entitled as commissions, had the goods been legally imported. It appears to me that, under those circumstances, the money should remain where the parties by their agreement placed it.

The ground relied on to sustain the suit is, that the money was paid under a mistake of the law. But, from the view I take of the case, it does not seem to be at all material whether the payment was made under such mistake or not. The authorities are, in my opinion, abundant to show that where money has been paid under the circumstances of this case as above stated, the mere fact that the payment was made in ignorance of the law, or under a mistake of it, will not authorize the recovery of it back.

In Chitty on Contracts the language used is: "And with respect to payments made by *mistake*, this difference exists, namely, that if the plaintiff were merely ignorant of the *law* or *legal effect* of all the circumstances under which he paid the money, he cannot recover back the money so paid; but if he were mistaken as to a material *fact*, and the money was paid under the influence of that mistake, it may be recovered back, although the mistake was as to a fact within his knowledge. *Bilbie vs. Lumley* is a leading case upon this subject.

It was an action by an underwriter, upon a policy on a ship, to recover back money he had paid to the defendant as for a loss by capture. A material fact had been concealed from the underwriter, and such concealment would have afforded him a defence; but *after* he had been apprised of the concealment he paid the money—not being at the time aware of the legal effect thereof—and it was held that he could not recover back the amount.”—(Chitty on Contracts, 9th Amer. ed., 640.) That is the doctrine of courts at law. The general rule is the same in courts of equity. The following is the language used by Judge Story:

“And first in regard to mistakes in matter of law. It is a well known maxim, that ignorance of law will not furnish an excuse for any person either for a breach or for an omission of duty; *Ignorantia legis neminem excusat*; and this maxim is equally as much respected in equity as in law. It probably belongs to some of the earliest rudiments of English jurisprudence, and is certainly so old as to have been long laid up among its settled elements. We find it stated with great clearness and force in *The Doctor and Student*, where it is affirmed that every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law. The probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might not be carried. Indeed, one of the remarkable tendencies of the English common law upon all subjects of a general nature is, to aim at practical good rather than theoretical perfection, and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business. If, upon the mere ground of ignorance of the law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance. there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature and difficulty of the proper proofs. The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretence that, at the time of parting with it, he was ignorant of the law acting on his title. Mr. Fonblanque has accordingly laid it down as a general proposition, that in courts of equity ignorance of the law shall not affect agreements nor excuse from the legal consequences of particular acts. And he is fully borne out by authorities.”—(1 Story's Commentaries on Equity, 121.)

The following is copied from Parsons on Contracts:

“Law gives no relief where the mistake is one of law, or one arising from ignorance of law. This is well settled. It was once intimated that the maxim '*Ignorantia legis neminem excusat*' applied only to crimes and public offences; but it is now universally agreed that it is of equal force in civil cases at law. Whether this rule has equal force in equity may not be quite so certain. In England, at least, there is some conflict. But even there the courts of equity appear now

to adopt this rule; and in this country the high authority of the Supreme Court of the United States, as well as the State courts generally, may be regarded as having conclusively established the rule, subject perhaps to some qualification in particular cases."—(2 Parsons on Contracts, 2d ed., 556.)

There is the following decision on this subject in the Supreme Court of the United States: In 1818 R. Griffing drew a bill of exchange in Kentucky on J. Daniel for \$10,000 in favor of H. Daniel, payable at New Orleans. The bill was accepted and endorsed to the Bank of the United States, and was afterwards protested for non-payment. The bank looked to the parties on the bill not only for the amount of the bill and charges of protest, but also, under a Kentucky statute, for ten per cent. damages on the bill. The drawer and acceptor, believing the ten per cent. damages to be required by the statute, paid \$3,330 67 on account of the aggregate amount supposed to be due, and for the balance gave their note with sureties for \$8,000. On that note \$500 were afterwards paid, and a new note given to the bank for the balance. The bank afterwards sued on the last named note in the circuit court of the United States for the Kentucky district, and recovered judgment. The judgment debtors then filed a bill in equity in said court, stating, *inter alia*, that the bank was not entitled to said ten per cent. damages by the statute of Kentucky, and that the amount of those damages were included in said \$8,000 note by *mistake*. The bill prayed that the judgment be enjoined as to the ten per cent. damages, which damages amounted to \$1,000 and interest. The injunction was granted, and the bank appealed to the Supreme Court of the United States.

The Supreme Court reversed the judgment, and, in their opinion, used the following language:

"The main question on which relief was sought by the bill, that on which the decree below proceeded, and on which the appellees rely in this court for its affirmance, is, can a court of chancery relieve against a mistake of law? In its examination we will take it for granted the parties who took up the bill for ten thousand dollars, included the damages of a thousand dollars in the eight thousand dollar note, and did so, believing the statute of Kentucky secured the penalty to the bank, and that in the construction of the statute the appellees were mistaken. Vexed as the question formerly was, and delicate as it now is, from the confusion in which numerous and conflicting decisions have involved it, no discussion of cases can be gone into without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply. Indeed, the remedial power claimed by courts of chancery to relieve against mistakes of law is a doctrine rather grounded upon exceptions than upon established rules. To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remediable is well established, as was declared by this court in *Hunt vs. Rousmanier*, 1 Peters, 15; and we can only repeat what was there said, 'that whatever exceptions there may be to the rule, they will be found few in

number, and to have something peculiar in their character,' and to involve other elements of decision.—(1 Story's Ch., 129.)

"What is this case, and does it turn upon any peculiarity? Griffing sold a bill to the United States bank at Lexington for ten thousand dollars, endorsed by three of the complainants, and accepted by the other, payable at New Orleans; the acceptor, J. D., was present in Kentucky when the bill was made, and there accepted it; at maturity it was protested for non-payment and returned. The debtors applied to take it up, when the creditors claimed ten per cent. damages by force of the statute of Kentucky. All the parties bound to pay the bill were perfectly aware of the facts; at least the principals who transacted the business had the statute before them, or were familiar with it as we must presume, they and the bank earnestly believing (as in all probability most others believed at the time) that the ten per cent. damages were due by force of the statute; and, influenced by this opinion of the law, the eight thousand dollar note was executed, including the one thousand dollars claimed for damages. Such is the case stated, and supposed to exist by the complainants, stripped of all other considerations standing in the way of relief.

"Testing the case by the principle 'that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts,' and under circumstances repelling all presumptions of fraud, imposition, or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case; and the question then is, were the complainants entitled to relief? To which we respond decidedly in the negative."—(The Bank of the United States *vs.* Daniel, 12 Peters, 32.)

The present claimant's testator, Mr. McCulloh, lived about twenty-four years after the payment of the money now sued for; that is, till the year 1836, and continued in office until his death; but it does not appear that he ever presented the claim to any of the departments or to Congress, nor does it appear to have been so presented at any time since his decease by his representative; nor is there any testimony offered explanatory of the delay.

The goods in question, with others, had been imported under a mistake relative to certain British orders in council, and without any real fault of the importers. It was to be expected that the importations would be placed on the same footing as if they had been legal. They amounted to about eighteen millions of dollars, and the duties to about five millions of dollars.—(8 Amer. State Papers, 571.)

If the present suit be sustained, it is upon the ground that, by the remission the custom-house officers are entitled to receive one-half of those duties, notwithstanding they may have voluntarily paid over the money to the treasury under the above mentioned circumstances of this case, and have received their commissions, and notwithstanding between forty and fifty years have been suffered to elapse without complaint. I do not accede to that doctrine. It is not, in my opinion, in accordance with the authorities already referred to. The case of *McLane*, cited at the bar, is clearly distinguishable from this

case for the reason, were there no other, that in McLane's case the money had not been paid over to the treasury of the United States.

The present case, it is true, is between an individual and the government; but I know of no principle by which it can be distinguished from a case between individuals.

It is the opinion of the court that the claimant is not entitled to recover.

IN THE COURT OF CLAIMS.

JAMES H. McCULLOH, EXECUTOR OF JAMES H. McCULLOH, *vs.* THE UNITED STATES.

LORING, Justice:

The facts of the case are that James H. McCulloh, as collector for the district and port of Baltimore, between the first day of August and the thirty-first day of December, 1812, seized certain goods and merchandise, (specified in exhibit B,) as forfeited to the United States by a violation of the non-intercourse acts of March 1, 1809, (2 U. S. Stat. at Large, 529,) and March 2, 1811, (Ib., 651.) The goods and merchandise belonged to citizens of the United States, and arrived at Baltimore between the first day of August and the fifth day of November, 1812, (exhibit A,) in nine vessels, which "did depart from some port or place in the United Kingdom of Great Britain and Ireland, between the twenty-third day of June and the fifteenth day of September, 1812."—(Exhibit C, 1 to 18 inclusive.)

Informations were filed in the district court of the United States for the district of Maryland, and the proper proceedings were had to enforce the said forfeitures.

On the arrival of the goods their owners gave bonds at the custom-house for the duties upon them "*as if they had been legally imported,*" (exhibit B;) and when the informations were entered in court, the owners appeared and filed their answers, and also prayed that the goods and merchandise might be re-delivered to them according to the provisions of the 89th section of the United States act of March 2, 1799.—(U. S. Stat. at Large, vol. 1, p. 627.) Thereupon the goods and merchandise, by the order of the court, were appraised and re-delivered to the claimants, upon their executing bonds for their appraised value, according to the provisions of the section referred to.

Pending the proceedings in court, and before judgment, the forfeitures of the goods and merchandise were remitted by the Secretary of the Treasury, by the several acts of remission set forth in exhibit C, 1 to 21 inclusive. The owners of the goods paid their bonds given at the custom-house for the duties on the goods "*as if they had been legally imported,*" and thus cancelled those bonds. The lawful duties thus paid amounted to the sum of four hundred and eighty-six thousand six hundred and forty-nine dollars and eighty cents.—(Exhibit A.)

This sum James H. McCulloh, the collector, accounted for and paid into the treasury of the United States, "in the same manner as lawful duties were accounted for and paid;" and the petitioner, as the executor of the said James H. McCulloh, claims one-sixth of this sum, or eighty thousand one hundred and eight dollars and thirty-cents, as the share or proportion belonging to his testator under the 91st section of the United States act of March 2, 1799, (1 Stat. at Large, 697,) which section provides for the distribution of fines, penalties, and forfeitures. The claim of the petitioner is thus stated: "The petitioner, however, does not set up a claim to one-sixth of the things forfeited, but to the proportion to which his testator, as collector, was entitled to of the amount reserved to the government as the condition of the remission, and which the government actually received."

On recurring to the acts of remission, (exhibits C, 1 to 21 inclusive,) it will be seen that three of them, viz: Nos. 19, 20, 21, were made by the Secretary of the Treasury under the United States act of March 3, 1797, (1 Stat. at Large, 506;) while all the other acts of remission were made under the act of January 2, 1813, (2 Stat. at Large, 789.) This difference in the acts of remission is not noticed in the petition, nor in the briefs submitted in the case; and the argument submitted for the petitioner seems inapplicable to the remissions No. 19, 20, 21, made by the Secretary of the Treasury under the act of March 3, 1797, and to be addressed solely to the remissions made under the act of January 2, 1813, which was passed after the seizures were made.

By the act of March 3, 1797. (1 Stat. at Large, 506,) it is enacted that the Secretary of the Treasury shall "have power to remit such fines, forfeitures, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just."

The act of January 2, 1813, (2 Stat. at Large, 789,) in relation to fines, penalties, and forfeitures incurred under the non-intercourse acts, by the importation of goods shipped from any port or place in the United Kingdom of Great Britain and Ireland, between the 23d of June and the 15th of September, 1812, enacts as follows: "The Secretary of the Treasury is hereby directed to remit all fines, penalties, and forfeitures that may have been incurred under the said acts, in consequence of such shipment, importation, or importations, upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on such goods, wares, or merchandise if legally imported; and also to direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease or be discontinued."

Whether the claim of the petitioner is for a proportion of the duties paid upon the goods, of which the forfeitures were remitted under both, or only under the latter of the two statutes last cited, I think that the answer is the same, viz: That in all these cases the United

States reserved nothing as the condition of the remission, and received from the importers only *legal duties*. Such duties are merely the price every lawful importer pays for the entry of his goods, and they belong exclusively to the United States as the fixed legal equivalent for their grant of entry; and the reservation of only lawful duties, such as every lawful importer pays, furnishes no inference that they were reserved as the condition of the remission of a forfeiture incurred. Such "legal duties" are always reserved in the remission of a forfeiture under the act of 1797, for the Secretary of the Treasury has no authority to remit them, and the nature of "legal duties" is not changed by being reserved under the act of January 2, 1812. All that can belong to seizing officers by the statute of 1799 is their share of the proceeds of goods forfeited and sold, or of a fine or penalty imposed instead of a forfeiture, or in mitigation of it; and the difference between these and legal duties is declared in the case of *Hoyt vs. The United States*, 10 Howard, 109. In that case the goods seized were redelivered to the owners on their executing a bond for the legal duties, and also for the appraised value of the goods themselves; the goods were condemned as forfeited and their proceeds were distributed according to law; but Mr. Hoyt the collector, claimed also a moiety of the legal duties which had been paid on the bond given therefor. The court denied his claim, and said: "A conclusive answer to this claim in the judgment of the court is, that the duties thus paid constitute no part of the proceeds of the goods forfeited, in which only the collector has an interest. The proceeds are the appraised value secured by the bond, or, in case no bond be given, the amount derived from the sale by the marshal after the deduction of the proper charges. The payment of the duties is a condition to the acceptance of the bond and redelivery of the goods, and is the voluntary act of the claimant. They do not enter into the question of condemnation, nor constitute any part of the forfeiture declared by the act or the judgment of the court." If legal duties made no part of the forfeiture where that was enforced, can they be held so to do where the forfeiture is remitted? And that is exactly the case at bar, as to the three remissions under the act of 1797. And if "*legal duties*," from their nature, belong to the United States and not to the seizing officers in the case of remissions under the act of 1797, for the same reason they would belong to the United States and not to the seizing officers under the act of January 2, 1812. In both cases, and in all cases, *legal duties* are the price of a grant, and not the expiation of an offence.

By the act of March 3, 1797, a discretionary power was given to the Secretary of the Treasury, and he was empowered to remit forfeitures, &c., and to discontinue prosecutions "upon such terms and conditions as he may deem reasonable and just." The act of January 2, 1813, was mandatory upon him, and he was required to remit forfeitures, &c., according to the provisions of the act, which, as has been stated, was passed after the seizures in all these cases had been made.

The argument for the petitioner contends (page 3) "that the right of the seizing officers had attached prior to the enactment of the law under which the remission was made, and that it is not in the power

of Congress to operate by legislation upon pre-existing vested rights." The answer is, that all the rights of the officers by the seizure in 1812 were conditional on the right of the United States to remit forfeitures declared by the act of March 3, 1797. And Congress, in the act of January 2, 1813, only used the right declared by the act of 1797.

The argument for the petitioner assumes that the 91st section of the act of 1799, which provides for the distribution of the proceeds of goods forfeited, &c., made a contract with the seizing officers by which, upon the seizure, they acquired a right in their statute proportion, of the proceeds of the goods forfeited, if they were not remitted by the discretionary power of the Secretary of the Treasury.

But when the United States, by the act of March 3, 1797, empowered the Secretary of the Treasury to remit forfeitures, &c., it was not the exhaustion nor a restriction of their right to remit, which was as absolute as their ownership of the goods, but it was only a provision for one mode of the exercise of that right. The Secretary of the Treasury, under that act, was only their officer or agent; his acts were their acts, and from that derived all their efficiency, and whatever the United States might do by such agent or officer, they might do directly themselves by an act of Congress, and this was the effect of the act of January 2, 1813; it only applied a power, or used a right, which was declared to exist in the United States in 1797. Thus, it was not the *right* to remit the forfeiture which was subsequent to the seizure in this case, but only the exercise of that right, and the mere act of remission is necessarily and always subsequent to the forfeiture. Besides, judicial decisions declare that, as between the United States and the seizing officers, no right is *fixed* or *vested* in them by the seizure, and that their proportion of the proceeds of the goods forfeited is a mere *gift*. This, according to its legal nature, vests no property and no right until it becomes a *gift executed*, and that is, when under the statute the goods have been condemned and sold, and the proceeds received by the collector for distribution among the statute distributees; then his possession is their possession as against the United States, and by such possession, and not before it, their property and rights are *vested*. In 10 Wheaton, 246, *United States vs. Morris, Thompson*, justice, in delivering the opinion of the court, says, in reference to the 91st section of the act of 1799: "The plain and obvious interpretation is, that the right does not become *fixed* until the receipt of the money by the collector"—(p. 291.) And Johnson, justice, in delivering a separate but concurring opinion, says of the distribution provided for in the 91st section of the act of 1799: "This distribution I consider as a mere *boon* from the government, which they may justly, and do practically, reserve a sovereign control over until so paid by their laws. The gift is from them of a thing perfected to them, and they may modify and withdraw that gift *ad libitum*. When once paid away according to legislative will, their control is at an end, and the right then, and not till then, becomes vested and absolute as between them and the officers, who to the last the law regards as *donees*." While the seizing officers are *donees* without possession they are with-

out contract or legal rights, for a gift without possession does not make a contract or a right.

Then it is contended, for the petitioner, that his claim is supported by the decision in *McLane vs. The United States*, 6 Peters, 404. But the reason for the decision in that case does not arise in the case at bar. In the case of *McLane vs. The United States*, the goods were seized as illegally imported, and pending the proceedings against them, and before the distribution of the proceeds of the goods, their owners, by a special act of Congress, (of July 29, 1813, U. S. L. 6 vol., 122,) were allowed to enter the goods on paying *double* the amount of the legal duties upon them. Such *double* duties could not be held legal duties, and were therefore held to be a penalty reserved by the United States, and so reserved as well for the benefit of the seizing officers in their statute proportion as for the United States; and the case is so stated by Judge Story in delivering the opinion of the court, and in forming the question which arises on the special act of Congress. His words are: "The question then arises, in what light the reservation and payment of the *double duties* as conditions upon which the remission is granted are to be considered. Are the double duties to be deemed a mere payment of lawful duties? or are they to be deemed a part of the forfeiture reserved out of the goods? If the latter is the true construction, then the collector is entitled to a moiety; if the former, he is barred of all claim." This is an emphatic declaration and decision that if the duties reserved had been the lawful duties only, the seizing officers would have had no claim to them. Again, he likens the reservation of the double duties to the reservation of a gross sum as the condition of the remission. Clearly the reservation of a gross sum exceeding the legal duties could be nothing but a penalty, and Justice Story says: "Our opinion is grounded upon the fact that the act refers to the *double duties* as a mere mode of ascertaining the amount, and that it is undistinguishable from the reservation of a gross sum." And the point decided in *McLane vs. The United States* is restated in *Hoyt vs. The United States*, 10 How., 109, where the court say of it: "The only doubt that existed was, whether or not the amount thus reserved should be considered as *legal duties belonging to the government*, or a portion of the forfeiture the residue of which had been remitted. The amount reserved was to be equal to the *double* duties imposed on goods imported, under certain circumstances, by an act which had been passed since the forfeiture occurred; and the court was of opinion that the duties mentioned in that act were referred to simply as a measure to determine the sum to be reserved, and not as duties in the common acceptation of the term." Here again the declaration is distinctly repeated, that if *legal duties* only had been reserved, they would have belonged to the government.

In *McLane vs. The United States*, the inference that the duties reserved were like a gross sum, and so in the nature of a penalty, was drawn solely from the fact that the duties reserved were *double* the legal duties, while in the case at bar there is no ground for such an inference, because the only duties reserved were the legal duties, and the precise difference between the two cases is that the case of *McLane*

vs. The United States was not a case of the *remission* of a forfeiture, but a case of the *mitigation* of a forfeiture; while the case at bar is a case of the entire remission of a forfeiture, by which it is legally annulled and made as if it had never been, because its legal consequences are abrogated. This is done when the goods are placed on the same footing as goods legally imported, and that is when they are entered on the payment of *legal duties only*.

Upon the whole case, I am of opinion that the legal duties received by the United States belonged to them exclusively; and that therefore, on the merits of the case, the petitioner has no claim, and is not entitled to the relief he prays for.

IN THE COURT OF CLAIMS.

JAMES H. McCULLOH, EXECUTOR, *vs.* THE UNITED STATES.

SCARBURGH, J., dissented.

Between the first day of August and the thirty-first day of December, A. D. 1812, James H. McCulloh, the petitioner's testator, as the collector of the customs for the district and port of Baltimore, seized large quantities of goods as forfeited under the non-intercourse acts of March 1, A. D. 1809, (2 Statutes at Large, page 529,) of May 1, A. D. 1810, (2 Statutes at Large, page 605,) and of March 2, A. D. 1811, (2 Statutes at Large, page 651.) The usual proceedings were thereupon had in the district court of the United States for the district of Maryland to enforce the forfeitures. Before judgment, the Secretary of the Treasury in all the cases except three, under the authority of the act of Congress of January 2, A. D. 1813, (2 Statutes at Large, page 789,) remitted the fines, penalties, and forfeitures which had been incurred, upon the costs and charges being paid, and on payment of the duties *which would have been payable by law on the goods, if legally imported*. In the other three cases, the Secretary of the Treasury, likewise before judgment, under the authority of the act of March 3, A. D. 1797, (1 Statutes at Large, page 506,) remitted the penalties and forfeitures which had been incurred, on *payment of costs and duties*.

The parties interested, in pursuance of the terms of remission, paid to the petitioner's testator, collector as abovementioned, the sum of *four hundred and eighty-six thousand six hundred and forty-nine $\frac{89}{100}$ dollars*, the amount which would have been payable by law for duties on the forfeited goods if they had been legally imported. Afterwards the petitioner's testator paid or accounted for the same to the United States.

The petitioner insists that the money so paid was reserved out of the forfeitures, and not paid for duties *as such*, and that his testator, under the non-intercourse acts, and the act of March 2, A. D. 1799,

was entitled to the one-sixth part thereof. This has not been paid, and it is now claimed by the petitioner.

The act of Congress of January 2, A. D. 1813, was as follows: "In all cases where goods, wares, and merchandise, owned by a citizen or citizens of the United States, have been imported into the United States from the United Kingdom of Great Britain and Ireland, which goods, wares, and merchandise were shipped on board vessels which departed therefrom between the twenty-third day of June last, and the fifteenth day of September last, and the person or persons interested in such goods, wares, or merchandise, or concerned in the importation thereof, have thereby incurred any fine, penalty, and forfeiture, under an act entitled 'An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,' and an act entitled 'An act concerning the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,' and the act supplementary to the act last mentioned, on such person or persons petitioning for relief to any judge or court proper to hear the same, in pursuance of the provisions of the act entitled 'An act to provide for mitigating or remitting the fines, forfeitures, and penalties, in certain cases therein mentioned;' and on the facts being shown, on inquiry had by said judge or court, stated and transmitted, as by said act is required, to the Secretary of the Treasury; in all such cases wherein it shall be proved to his satisfaction that said goods, wares, and merchandise, at the time of their shipment, were *bona fide* owned by a citizen or citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June last and the fifteenth day of September last, the Secretary of the Treasury is hereby directed to remit all fines, penalties, and forfeitures, that may have been incurred under the said acts in consequence of such shipment, importation, or importations, upon the costs and charges that have arisen, or may arise, being paid, and on the payment of the duties which would have been payable by law on such goods, wares, and merchandise if legally imported; and also to direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued: *provided, nevertheless*, that no case in which the purchase of such goods, wares, and merchandise was made after war was known to exist between the United States and Great Britain at the port or place where such purchase was made, shall be entitled to the benefits of this act."—(2 Statutes at Large, page 789 and 790, chapter 7.)

By the subsequent act of July 29, A. D. 1813, it was provided "that the owners of the ships called the Good Friends, the Amazon, and the United States, and of the cargoes on board said vessels, which vessels arrived in the month of April, one thousand eight hundred and twelve, in the district of Delaware, from Amelia Island, with cargoes that were shipped on board said vessels in the United Kingdom of Great Britain and Ireland, shall be entitled to and may avail themselves of all the benefits, privileges, and provisions of the

act entitled 'An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases,' passed on the second day of January last past, in like manner and on the same conditions as though said vessels had departed from the kingdom aforesaid between the twenty-third day of June and the fifteenth day of September, mentioned in said act, and had arrived within the United States after the first day of July last.'"—(6 Statutes at Large, page 122, chapter 32, § 1.)

Under the authority of the last mentioned act, the Secretary of the Treasury remitted the forfeiture which had been incurred in the case of the ship *Good Friends* and her cargo, upon payment of the duties which would have been payable by law on the goods, if they had been legally imported after the passage of the act of July 1, A. D. 1812, ch. 112, (2 Stat. at Large, p. 768,) *i. e.* upon payment of the double duties imposed by the last mentioned act. In the case of *McLane vs. The United States*, (6 Peters' R., 404,) it was held that the duties so paid were a part of the forfeiture, and reserved as well for the collector as for the United States. The court were of the opinion that goods imported in violation of the non-importation acts, being prohibited goods, were not entitled to entry at the custom-house, or to be bonded; and that no duties *as such*, could legally accrue upon their importation. They were also of the opinion that the act of July 29, A. D. 1813, taken in connexion with the act of January 2, A. D. 1813, in requiring the payment of double duties—*i. e.*, the duties which would by law have been payable on the goods, if they had been legally imported after the first day of July, A. D. 1812—as a condition on which the forfeiture should be remitted, merely referred to those duties as a mode of ascertaining the amount to be reserved out of the forfeiture; that it is undistinguishable from the reservation of a gross sum; and that it was not a declaration of intention on the part of the government that they were to be received as legal duties due upon a legal importation.

I propose to consider the petitioner's case under two aspects: 1st, with reference to the remissions made under the act of January 2, A. D. 1813; and, 2d, with reference to the remissions under the act of March 3, A. D. 1797.

1. Considering this case with reference to the remissions under the act of January 2, A. D. 1813, the case of *McLane vs. The United States*, so far as it goes, is, it seems to me, precisely analogous to it. In that case as in this, the goods at the time of their importation were subject to no duty; their importation was expressly prohibited by law; they had been forfeited to the United States; the owner of them had become liable to pay, *not duties*, but a penalty equal to treble their value; and the act under which the remissions were made, was passed *after, and not before* the goods were imported. In all these respects, therefore, the analogy between the two cases is complete.

Moreover the act of July 29, A. D. 1813, did no more than merely extend to the cases therein mentioned the act of January 2, A. D. 1813, by declaring, in effect, that the parties interested should be en-

titled to and might avail themselves of all the benefits, privileges, and provisions of the latter act, *in like manner and on the same conditions* as though their cases had fallen within its particular provisions. In other words, the act of July 29, A. D. 1813, merely adopted as the law which should govern the cases therein mentioned the act of January 2, A. D. 1813. It is therefore to my mind entirely clear, that an interpretation of the act of July 29, A. D. 1813, taken in connexion with the act of January 2, A. D. 1813, is an interpretation of the latter act itself.

The only point in which it has ever been suggested that the analogy between the case of *McLane vs. The United States* and this case, under the aspect which I am now considering, is not complete, is, that in the former case the duties exacted as a condition of the remission were *double* the duties which would have been payable by law on the goods if they had been legally imported, at the time of their actual importation; whilst in this case, the duties exacted as a condition of the remission were only *such* duties as would have been payable by law on the goods if they had been legally imported, at the time of their actual importation. But it seems to me, this difference is wholly immaterial. The duties were the *same* in both cases. No duties, *as such*, legally accrued or were demandable upon the goods at the time they were imported in either case. There was then no law in force imposing duties upon such goods so imported. The law applicable to them, instead of imposing duties upon them, subjected them to forfeiture, and their owners, *not to duties*, but to a penalty equal to treble their value. Hence the act of January 2, A. D. 1813, required the payment, not of the duties which *had* by law accrued and become payable, but of the duties which *would* have been payable by law on the goods, *if they had been* legally imported. It is for this reason that the court, in the case of *McLane vs. The United States*, were of the opinion that the statute refers to the double duties as a mere mode of ascertaining the amount to be reserved out of the forfeiture. But it is obvious that this reason is as applicable in this case as in the case of *McLane vs. The United States*. Moreover it would be an anomaly in legislation, (to say nothing about the constitutional power of Congress over the subject,) *after* goods had been imported, *then* to enact a law imposing a duty upon their importation. With entire respect for those who differ with me in opinion, I am constrained to say, that I am wholly unable to comprehend how, in the case of *McLane vs. The United States*, it can be truly said that the double duties were referred to as a mere mode of ascertaining the amount to be reserved out of the forfeiture, and yet the same thing is not true in this case. Nor can I understand how the same words in the act of January 2, A. D. 1813, when applied to the cases provided for by the act of July 29, A. D. 1813, shall have one meaning, and when applied to the cases provided for in the former act, a totally different meaning.

Although in the case of *McLane vs. The United States* the goods were imported before the act of July 1, A. D. 1812, yet their owners were guilty of a crime against the United States, the same in kind

and degree with that which had been committed by the owners, respectively, of the goods in the cases provided for in the act of January 2, A. D. 1813. Hence the same measure of remission was provided for both classes of cases. Inasmuch as in the case of *McLane vs. The United States* the goods being prohibited goods were subject to *no duties*, the exaction of any amount, though in the name of duties, was still a penalty. In this respect the only difference between the exaction of the duties which were payable by law on a legal importation *when* those goods were imported, and the exaction of the duties which were payable by law on a legal importation *when* the remission was made, was in degree, and not in kind; the exaction was as much though not so great a penalty in the one case as in the other. In both cases it was something which had never been imposed except by way of penalty or forfeiture; in other words, it was a part of the forfeiture.

In the case of *Hoyt vs. The United States*, (10 How. R., 109,) the goods were condemned for a violation of the revenue laws, and at the time of their importation were subject by law to the very duties which were paid. After the seizure of the goods and the institution of proceedings for their forfeiture, the parties interested were allowed to take possession of them upon their executing bonds, with sureties, for the payment of a sum equal to the appraised value of the goods, and producing a certificate from the collector and naval officer that the duties on the goods had been paid or secured. But the payment of such duties in no way depends on the result of the prosecution. They are paid whether the prosecution fails or succeeds. "They do not enter into the question of condemnation, nor constitute any part of the forfeiture declared by the act or the judgment of the court." The distinction, and it is a broad one, between the case of *Hoyt vs. The United States* and that of *McLane vs. The United States* is, that in the former the goods *were*, but in the latter they *were not*, at the time of their importation, subject to duties. Hence in the former the duties paid were paid *as duties*, but in the latter the sums paid were duties in *name* only, whilst in fact and in law they were a part of the forfeiture.

2. Considering this case with reference to the remissions made under the act of March 3, A. D. 1797, it is still more plain that the amount reserved in the name of duties was but a reservation out of the forfeiture. Under that act the Secretary of the Treasury has power, in the cases therein provided for, "to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just." Unless this act gives to the Secretary of the Treasury the legislative power to impose duties on importations where none are imposed by law, then whatever he reserved in this case could have been lawfully reserved only in mitigation and a part of the forfeiture. It cannot be pre-

tended that any such power was conferred upon the Secretary of the Treasury. It is his duty to execute not to make laws. There can be no doubt that, under the power to impose such conditions as he may deem reasonable and proper, he may require, as a condition on which the prosecution shall be discontinued, that the duties payable by law on the goods shall first be paid to the collector. But he can lawfully do no more. He cannot create new duties unknown to the revenue laws. The 89th section of the act of March 2, A. D. 1799, ch. 128, (1 Stat. at L., p. 695,) has no application to the prosecutions under the non-intercourse acts.—(*The Brig Struggle*, 1 Gallison R., 470.)

It has been suggested that the payment by the petitioner's testator of the several sums of money received by him for the reservations above mentioned was a voluntary payment, and that he cannot, therefore, recover back the proportion thereof to which his testator was entitled. He obviously made the payment in discharge of what was believed to be his official duty. The sums so paid were regarded both by him and the government as *duties*, and not as a part of the forfeiture. The law did not require the payment, but it was made with a knowledge of all the facts, under a mutual mistake of the law, both parties having the law in contemplation and in good faith meaning to conform to it, but acting under a misconception ascertained by a subsequent decision of the Supreme Court of the United States. The payment embraced not only money to which the petitioner's testator was entitled, but also money to which the naval officer and surveyor were entitled, the one-half thereof being subject to distribution amongst the collector, naval officer, and surveyor, and the other half being due to the United States. To say that the payment was voluntary—*i. e.*, a *gift* to the United States—is to say that the collector took upon himself to give to the United States not only his own money, but the money of the other two officers. This, to my mind, is obviously in direct conflict with the truth. In a case like the present, between individuals, I consider the true principle to be that, when money is paid by one under a mistake of his rights and his duty, which he was under no legal or moral obligation to pay, and which the other has no right in good conscience to retain, it may be recovered back, whether such mistake be one of fact or of law.—(*Northrop vs. Graves*, 16 Conn. R., 548, and the cases cited in the opinion of this Court in *Sturges, Bennett & Co. vs. The United States*.)

In the case of *Hunt vs. Rousmanier*, (1 Peters' R., 1,) and also in the case of *The Bank of the United States vs. Daniel*, (12 Peters' R., 32,) the decision of the court rests on the ground that the money might be conscientiously retained. But in the case of *Wheeler vs. Smith*, (9 How. R., 55,) a release from an heir-at-law to executors, made with a knowledge of all the facts, but under a mutual mistake of law, was set aside because it was against conscience to retain it. The court say: "The influence operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely and *with a proper understanding of his interests*."

This principle, it seems to me, applies with peculiar force where

the payment is made by a public officer in discharge of what he, by mistake of law, believes to be his official duty. It would be impolitic and unwise to discourage such fidelity. The most elevated good faith, *uberrima fides*, should be observed in all the relations between the government and its officials. It would indeed be a dangerous principle which would require a public officer to deal at arm's length with his government in his official transactions. On the contrary, whenever he acts in good faith, under a conscientious conviction of duty, no mistake either of fact or of law, at least as between him and the government, should subject him to loss. When, therefore, under a mistake of his rights and his duty, he pays to the government money which in good faith he believes is due to the government, but which the government itself has by law declared is really his own, and which would not have been paid or demanded if the law had not been mistaken, his right to recover it back, it seems to me, is sustained not only by the just principles of law and good morals, but by the obvious dictates of an enlightened public policy. Money so paid cannot be conscientiously retained. It may, I think, be said of the petitioner's testator, as it was of the complainant in *Wheeler vs. Smith*, and even with greater emphasis, "*he did not act freely and with a proper understanding of his interests.*"

My opinion is that the petitioner is entitled to relief.

DOCTOR JAMES THACHER—HEIRS OF.

JANUARY 18, 1859.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HEIRS OF DR. JAMES THACHER *vs.* THE UNITED STATES.

1. The petition of the claimants and amendment.
2. Agreement of claimants' counsel and deputy solicitor to submit the case.
3. Claimants' brief.
4. Deputy solicitor's brief on the first hearing and on the reargument, and solicitor's brief on reargument.
5. Supplemental brief of claimants' counsel.
6. Opinion of the Court refusing an order to take testimony, delivered by Judge Blackford.
7. Opinion of Judge Loring, concurring.
8. Opinion of Judge Scarburgh, dissenting.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the
[L. s.] seal of said Court at Washington, this 17th day of January,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, *Washington county.*

To the honorable the Judges of the United States Court of Claims:

The petition of Betsey H. Hodge, of Plymouth, Massachusetts, Susan T. Bartlett, of Cambridge, Massachusetts, children of Dr. James Thacher, deceased, late of Plymouth, Massachusetts, would with respect represent unto your honors:

That the said James was appointed a surgeon's mate in the army of the revolution as early as July, 1775, and was stationed at the hospital in Cambridge. In March following (1776) he was appointed surgeon's mate to the regiment commanded by Col. Asa Whitcomb, and in November, 1778, he was appointed *full surgeon* of the first Virginia State regiment, commanded by Col. George Gibson. In 1779, he accepted the office of surgeon to the Massachusetts regiment commanded by Col. Henry Jackson, and retired from service on the 1st of January, 1783; making a period of seven years and six months service, four years of which he was *full surgeon*.

On the 21st day of October, 1780, Congress *resolved*, "That the officers who continue in service to the end of the war shall also be entitled to half-pay during life, to commence from the time of their reduction."

On the 15th May, 1828, Congress passed the following act:

Act of May 15, 1828.

AN ACT for the relief of certain surviving officers and soldiers of the army of the revolution.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That each of the *surviving* officers of the army of the revolution in the continental line, who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, to begin on the 3d March, 1826, and to continue during his natural life: *Provided*, That under this act *no officer shall be entitled to receive a larger sum than the full pay of a captain in said line*.

Your petitioners would represent that under the provisions of this act the name of the said James was inscribed on the pension rolls of the United States at the rate of \$480 per annum. In the year 1832, (June 7th,) the following act was passed by the Congress of the United States, to wit:

Act of June 7, 1832.

AN ACT supplementary to the act for the relief of certain surviving officers and soldiers of the revolution.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That each of the *surviving* officers, non-commissioned officers, musicians, and Indian spies, who shall have served in the continental line, State troops, volunteers, or militia, at one or more terms, a period of *two years*, during the war of the revolution, and who are not entitled to any benefit under the act for the relief of certain surviving officers and soldiers of the revolution, passed 15th of May, 1828, be authorized to receive out of any money in the Treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank, but *not exceeding in any case the pay of a captain in said line*; such pay to commence from the 4th day of March, 1831, and shall continue during his natural life.

SEC. 2. (Parties must relinquish all claims under the act of 1828, or any previous acts, before claiming under this)

Under the provisions of this act, the said James relinquished all future benefits under the act of 1828, and availed himself of the privileges of the act of 1832, according to its provisions ; and his name was again placed on the pension roll of the United States, at the rate of \$600 per annum, from the 4th of March, 1831, and so continued to the date of his death in the year 1843.

Petitioners allege that under the act of May 15, 1828, the said James Thacher was legally entitled to \$600 per annum, that being the amount of the pay of a *captain in the line*, in the artillery, or cavalry, and being less than the pay of a surgeon ; and being so entitled, he often demanded pay thereof, but was refused by the Executive Department of the government charged with the paying of pensions.

Your honorable Court will perceive that, under the act of June 7, 1832, the said James was allowed his demand of \$600 per annum, the pay of a captain in the line as aforesaid, and yet the same has been and is still withheld, under the act of 1828, which is identical with that of 1832 in its phraseology in fixing the *amount* of pension.

Petitioners allege that surgeons in the revolution were entitled to receive and did receive sixty and seventy-five dollars per month ; and, as under the act of 1828, they could not receive "a larger sum than the full pay of a captain in the line," petitioners claim that the government is justly due them the difference between \$480 and \$600 per annum, from 3d March, 1826, to 4th March, 1831, five years, making \$600.

Petitioners would further represent that they applied to the Hon. L. P. Waldo, then Commissioner of Pensions, on January 17, 1854, for the aforesaid increase of pensions, and in reply to said application then, their agent received the following reply :

PENSION OFFICE, *January 23, 1854.*

SIR: Your letter of the 17th, asking in behalf of the surviving children of Doctor James Thacher, that the pension allowed to him under the act of May 15, 1828, at \$480 a year should be increased to \$600 a year is received and filed.

You rest this claim upon the ground that the class of pensions to which this belongs was allowed by the Hon. J. M. Porter, Secretary of War, under the act of June 7, 1832, at \$600 a year, and you claim that the phraseology of the two acts, so far as the amount of the pension is concerned, is the same.

It is true the terms of the two acts in this respect are similar, and yet Mr. Secretary Porter, after the decision to which you allude, held on the 17th day of February, 1844, that this class of cases under the act of May 15, 1828, *could not be increased to \$600*. Under these two rulings of the Secretary, it has been the uniform practice of this office to allow surgeons under the act of May 15, 1828, but \$480 a year, and to allow the same persons under the act of June 7, 1832, \$600 a year, if their service in the revolutionary army had been two years. it is not my duty to point out the reason for the distinction under the

two acts, and can only say, "*I so find the law written.*" I am, therefore, under the necessity of rejecting the claim for an increase of Doctor James Thacher's pension, under the act of May 15, 1828.

L. P. WALDO,
Commissioner of Pensions.

ALEXANDER RAY, Esq.,
Present.

This letter virtually admits the justice and validity of petitioners' claim, but again rejects it on the ground solely that such had been the previous ruling of the Pension Office, and of the Secretary of War in 1844.

Petitioners therefore pray your honorable Court, after a proper consideration in the premises to prepare and report a bill to Congress for their relief, appropriating to them the sum of six hundred dollars in payment of the balance of pension due under the law, and as in duty bound your petitioners will ever pray, &c.

A. H. EVANS.
Attorney for Claimants.

DISTRICT OF COLUMBIA, *Washington county.*

Personally appeared before the undersigned authority, a justice of the peace in and for said district and county, Alexander Ray, who after being duly sworn declares, that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

Subscribed and sworn to this _____ day of _____, 1856.

ALEXANDER RAY.

JAMES THACHER'S HEIRS *vs.* THE UNITED STATES.

The petitioners in this case, Betsey H. Hodge, of Plymouth, Massachusetts, and Susan T. Bartlett, of Cambridge, Massachusetts, now come by J. J. Coombs, their attorney, and beg leave of the court to amend their petition, and state that they are the children and only heirs at law of said James Thacher, deceased, and the sole owners of this claim.

IN THE COURT OF CLAIMS.—NO. 523.

JAMES THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.

It is agreed that this case shall be submitted upon the statement made in the petition by the claimant, and such argument as the solicitor may make orally or in writing.

A. H. EVANS,
Attorney for Claimant.
JOHN D. McPHERSON,
Deputy Solicitor.

UNITED STATES COURT OF CLAIMS.

JAMES THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.*Petitioners' brief.*

The first section of the act of May 15, 1828, under which this claim arises, provides "That each of the surviving officers of the army of the revolution, in the continental line, who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, to begin on the 3d of March, 1826, and continue during his natural life; *Provided*, That under this act, no officer shall be entitled to receive a larger sum than a captain in said line."

The continental line, in the revolutionary war, consisted of infantry, cavalry, and artillery. The pay of a captain of infantry was \$480 per annum; but the pay of a captain of cavalry or artillery was \$600 per annum. The pay of a surgeon in said line was more than \$600 per annum. The question is, whether the true construction of said act of May 15, 1828, limits the pay of a surgeon, under said act, to the *lowest* or the *highest* pay of a captain in the line. It is clear that said act of 1828 gives to a surgeon the full pay of a surgeon in the line, except so far as that pay is limited by the *proviso*. And this brings me to the question, what is the effect of a proviso upon the enacting clause of a statute? We claim the rule of law to be, that where any right is granted or conferred, in general terms, by the enacting clause of a statute, and afterwards limited by a proviso, the proviso should be *strictly construed*, so as to limit the operation of the enacting clause no further than a *strict construction* of the language of the proviso necessarily requires. This is the rule laid down by the Supreme Court in the case of the United States *vs.* Dickson, (15 Pet., 165.) The court say, that this is a "general rule of law which has always prevailed, and become consecrated almost as a maxim in the construction of statutes."

Apply the rule to this case. By the enacting clause of the act of 1828, Dr. Thacher is given the full pay of a surgeon (more than \$600,) but then comes in the proviso, and limits his pay to the *full pay of a captain*. The terms of the proviso apply just as well to a captain of cavalry or artillery as to a captain of infantry. The amount of his pay, therefore, under the act of 1828, depends entirely upon the question, whether the proviso is to be construed *liberally*, so as to limit the operation of the enacting clause *most*, or *strictly*, so as to limit its operation *least*. The law says, it is to be construed *strictly*.

The point decided in the case of Wetmore *vs.* the United States, (10 Pet., 647,) is not similar to the point involved in this case. The plaintiff in error in that case served as paymaster in the army, from the 24th of April, 1816, to the 31st of May, 1831. He claimed the pay and emoluments of a major of cavalry, but the court decided that he was only entitled to the pay and emoluments of a major of infantry.

The act fixing the rate of his pay was the 3d section of an act of April 24, 1816, which declared, that regimental and battalion paymasters shall receive the pay and emoluments of majors, without specifying whether of cavalry or infantry. But when said act of April 24, 1816, was passed, *cavalry did not form any part of the army*, and consequently no such rank as major of cavalry existed in the army. On this point, the court say: "When to ascertain what the pay and emoluments (of regimental paymasters) are, we have to resort to the 3d section of the act of 1816, and there find it to be those of a major, the law must mean a *regimental, and not a staff major*. Certainly it should not be tortured to mean one of the arms of defence, or kinds of regiment, of which there is none in the army. When the act of 1816 was passed, cavalry did not form a part of the army; consequently, no such rank as major of cavalry existed, by which the pay of paymasters could have been graduated.

"But if, at the passage of the act of 1816, there had been such a rank in the army as major of cavalry, the question would have been a different one from the question now before the court. If the act of 1828 had simply provided that, surgeons should receive the same pay as captains, there would, at least, have been ground to doubt whether a captain of infantry or cavalry was intended. But when the enacting clause declares that a surgeon shall be entitled to receive the *full pay of a surgeon*, (which is more than the pay of *any* captain,) and then the proviso comes in and limits that pay to the full pay of a captain, the rule which requires the proviso to be construed *strictly*, settles the matter in favor of the right of a surgeon to receive the *highest* pay of a captain. In other words, a surgeon is entitled to all the benefits of the enacting clause, which the proviso strictly construed, does not necessarily take away."

The act of June 7, 1832, the language of which, so far as it relates to this point, is precisely like that of the act of 1828, has uniformly been construed to give a surgeon the full pay of a captain of cavalry or artillery. Dr. Thacher was himself permitted to relinquish the benefits of the act of 1828, and to receive \$600 per annum under the act of 1832 from the time of the commencement of pensions under the last named act. Yet, strange to say, he has been uniformly denied the same rate of pay during the five years in which the act of 1828 was in force, prior to the taking effect of the act of 1832. We have the singular anomaly, of the same words in two different statutes on the same subject, being construed by the same public officers to mean very different things.

But this is not all. If the proviso to the first section of the act of 1828 limits the pay of a surgeon to the pay of a captain of infantry, it surely limits the pay of every other officer in the same manner. It is well said by the solicitor in his brief that "the proviso purports to fix one certain sum beyond which no pension can go, and it is difficult to perceive how this maximum can be construed to vary in different cases." Yet, under said act of 1828, colonels, majors, &c., and captains of artillery and cavalry have always been allowed \$600 per annum. In fact, I believe every officer whose pay equalled or exceeded the pay of a captain of cavalry or artillery has been allowed

the maximum of \$600, with the exception of surgeons. It strikes me as a patent absurdity to say that the proviso limits the pay of a surgeon to that of a captain of infantry, while it permits captains of cavalry and artillery and majors and colonels to receive the full pay of a captain of cavalry. Yet such has been the construction.

J. J. COOMBS,
Attorney for Petitioners.

N. B. Since the petition was filed in this case a question has arisen as to the right of children or other representatives to receive the back pension to which the parent may have been entitled (although the same was not *allowed*) in his or her lifetime. On the 19th September last the Attorney General gave an opinion adverse to the rights of children or other representatives to recover in such cases. As my brief on that question, I beg leave to present a printed pamphlet reviewing said opinion of the Attorney General, with a copy of said opinion appended.

J. J. C.

A review of the opinion of the Attorney General.

The Supreme Court of the United States, at its last term, in a case coming before it by writ of error from the supreme court of Tennessee, decided that children and grandchildren are jointly entitled to share the back (revolutionary) pension to which the parent had died entitled, although never establishing a claim to it while living. As it had been the prevailing practice of the Pension Office for several years past, to allow such claims to children only, in exclusion of grandchildren, this decision induced the Secretary of the Interior to refer the whole question as to the legal rights of the parties in such cases to the Attorney General for his opinion thereon. That officer has recently given his opinion, to the effect that, when a person so entitled to a pension dies before the allowance of the claim, the right *lapses* to the government, and that neither *children* nor *grandchildren* are entitled to anything. His reasoning goes to the extent also of excluding widows from recovering the pensions to which their husbands may have died entitled; and such has been the practical effect given to the opinion. So that now, under the practical operation which has been given to this opinion, all claims to revolutionary pensions die with the claimant, if not established in his or her lifetime. Said opinion is reviewed in the following pages:

The series of revolutionary pension acts now in force commenced with the act of May 15, 1828, and embraces the supplemental act of June 7, 1832, and the various widows' acts of March 4, 1836, July 7, 1838, July 29, 1848, &c. The acts embraced in this series differ from all prior pension laws (except some relating to navy pensions, which will hereafter be noticed,) in one essential par-

ticular, viz: Each one of these acts provides that the pension granted by it shall commence on a certain specified day, anterior to its passage, and vests in the beneficiary an *absolute* and *unconditional right* to the pension from that day, independent of the performance of any *subsequent act* by such beneficiary, or of any possible *future contingency*. It is under the acts embraced in this series only (with the exception of the navy pension acts above referred to,) that the practice has hitherto prevailed of allowing children (or other heirs or representatives) to receive, after the death of the party primarily entitled, the amount of pension which had accrued up to the time of his or her death, although never allowed by the department in the lifetime of the decedent.

As it is admitted by the Attorney General that the rights of children (or other heirs) stand upon precisely the same footing, under all the several acts belonging to this series, I shall, in my subsequent remarks, for the sake of perspicuity, refer specially to the provisions of the act of May 15, 1828, that being the first of the series, and the act under which the practice (so far as it relates to revolutionary pensions) originated. All I shall say of the provisions of that act, however, will apply with equal force to the subsequent acts of the series, so far as the question under consideration is concerned.

Said act of May 15, 1828, provides that "each of the surviving officers of the army of the revolution, in the continental line, who was entitled to half-pay by the resolve of October 21, 1780," and that "every surviving non-commissioned officer, musician, or private, who enlisted in said army for and during the war, and continued therein until its termination," &c., shall "be authorized to receive, out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, *to begin on the 3d of March, 1826*, and to continue during his natural life."

It will be seen that this act vested in the beneficiary, immediately upon its passage, an *absolute* and *unconditional* right to the pay (or pension) from said 3d of March, 1826. All the *conditions* requisite to entitle him to said pay were *past* and *perfected* acts. No person not entitled to the benefits of said act immediately upon its passage, could, by any *subsequent act* or *contingency*, become entitled. True, before a party could enjoy the benefits of said act, he would have to make proof that he was a person embraced by the provision of the act; but this proof had nothing to do in conferring the *right*. He simply had to *identify* himself as one of the persons upon whom the right was conferred by the act. So if A should die seised of an estate in fee simple, the *right* and *title* to such estate would immediately vest in his heirs. But if B should come forward to claim the estate as the heir of A, he would be compelled to *prove* the fact that he was such heir, before he could be permitted to enjoy the estate. This proof of his heirship, however, would have nothing to do in conferring the *right* upon him. The right existed in the same perfection before he made proof of his heirship as afterwards. The act of May 15, 1828, having vested in the beneficiary an unconditional right to the pay from the 3d of March, 1826, it follows, as a matter of course, that the *accruing* pay, from said 3d of March, 1826, to any given pay day subsequent to the date of the act, was just as much a sum *due* the claimant *before* he had

made his proof and got his name inscribed on the pension roll as *afterwards*.

Said act, however, contained no *express* provision for paying the amount which had thus *accrued* and become *due* to a beneficiary in his lifetime, to his heirs or representatives in case of his death, before getting his name inscribed on the pension roll.

But there had long been in force certain navy pension laws, granting pensions for a term of years to widows whose husbands had died of wounds received in the naval service. These acts, like the act of May 15, 1828, granted *absolute and unconditional* pensions from the happening of a certain contingency, viz: the death of the husband as aforesaid; and for a long series of years they had been uniformly construed to confer *vested rights*, descendible to heirs and representatives. This construction had been expressly sanctioned by Mr. Attorney General Wirt, in an able opinion, dated June 9, 1825, (Opinion of Attorneys General, vol. 2, p. 1,) in which he says:

“Here is a right which the law says shall accrue to the widow on the happening of a certain event—that of her husband having died by reason of wounds,” &c. * * * “The law does not require either that application should be made by her, or that anything else should be done, in order to *consummate her right*. It is consummated by the mere fact of the death of her husband under the circumstances already mentioned. It is a *vested right* to so much money per annum, for five years,” &c. * * * “But I understand that, if a widow whose rights commenced under the act of 1814, now, for the first time makes an application for her pension under all the past acts, no difficulty arises as to her now receiving all that those acts give her, provided that she still remains the widow of the deceased. I understand, also, that even where she has since intermarried before she has made any application, or *has died before she has made any application*, the uniform practice of the department has been, not to consider the application too late for all that was due at the time of her marriage or *death*.” * * * “It is a liberal exposition of these acts, in advancement of the public policy on which they are founded, and I see no sufficient cause to disturb it by recommending a change.”

The execution of the act of May 15, 1828, was committed to the Secretary of the Treasury. That officer finding that the navy pension laws above referred to, framed upon the same principle, had been uniformly construed, for a long course of years, to confer *vested rights*, which did not *lapse* in case of death without asserting a claim, and finding this construction expressly sanctioned by the opinion of Attorney General Wirt, applied the same construction to said act of 1828, and decided immediately after its enactment, that it in like manner conferred vested rights, descendible to heirs and representatives. But whether that decision was right or wrong, I do not conceive to be now a very material question, inasmuch as Congress very shortly afterwards passed a law which (as it was then understood and construed) made express and positive provision on the subject. On the 2d of March, 1829, an act was passed in these words:

“That whenever any revolutionary pensioner shall die, the Secretary of War shall cause to be paid the arrears of pension due to the

said pensioner at the time of his death; and all payments under this act shall be made to the widow of the deceased pensioner, or to her attorney, or if he left no widow, or she be dead, to the children of the pensioner, or to their guardian, or his attorney; and if no child or children, then to the legal representatives of the deceased."

It was doubtless the understanding of Congress, at the time of passing this law, that the act of 15th May, 1828, conferred, as it had been construed to, *vested* and *descendible* rights. Its object was not to *create* the right of succession, (which was supposed to exist already,) but to *modify* that right—taking it out of the course prescribed by the common law, or the statute laws of the States, by giving the widow a preference over children, children over creditors, &c.

The word "pensioner," in this last-mentioned act, was construed to embrace the case of a man *entitled* to a pension under the act of 1828, but whose name had never been inscribed on the pension roll, as well as the case of one who was actually in receipt of a pension at the time of his death; and this construction has uninterruptedly prevailed from the passage of the act down to the present year. If this construction be tenable, it makes but little difference, in the present controversy, whether the right of succession existed before the passage of this act, and was only modified by it, or whether it originated in this act. In either aspect of the case the right now exists, and has existed at least since the passage of the last mentioned act.

On the 19th of June, 1840, Congress passed another act on this subject, as follows:

"SECTION 1. *Be it enacted, &c.*, That in case any male pensioner shall die, leaving children, but no widow, the amount of pension due to such pensioner at the time of his death shall be paid to the executor or administrator on the estate of such pensioner, for the sole and exclusive benefit of the children, to be by him distributed among them in equal shares; and the same shall not be considered as a part of the assets of said estate, nor liable to be applied to the payment of the debts of said estate, in any case whatever.

"SECTION 2. That in case any pensioner, who is a widow, shall die leaving children, the amount of pension due at the time of her death shall be paid to the executor or administrator, for the benefit of her children, as directed in the foregoing section.

"SECTION 3. That in the case of the death of any pensioner, whether male or female, leaving children, the amount of pension may be paid to any one or each of them, as they may prefer, without the intervention of an administrator."

It will be perceived that this is a mere re-enactment of the law of March 2, 1829, with some modifications. The principal modifications are: 1. To make the provisions of the said act of 1829 expressly applicable to the case of "any pensioner who is a widow," &c. 2. It entirely omits the clause of the act of 1829 which directed payment to be made to the legal representatives, in case there be no child or children living.

It will be observed, however, that it makes no change whatever, so far as the rights of widows and *children* are concerned, but leaves

them exactly as they stood under the act of 1829. A question arose, however, whether this act of 1840 did not, by implication, repeal that clause of the act of 1829 which directed payment to be made to the legal representatives, in case no child or children survived. And in 1845, Mr. Marcy, then Secretary of War, decided that it did repeal that clause of said act. In other words, he decided that the descent of the pension due at the decease of a person entitled, was limited to widows and *children*, and did not extend to *grandchildren* or collateral heirs.

Now, it is clear, that if the word "pensioner," as it occurs in said acts of 1829 and 1840, can be legitimately construed to apply to a man who is *entitled* to a pension under said act of 1828, although his name has never been inscribed on the pension roll, that must be the end of the controversy. And why may it not be so construed? As I have already shown, the law vests in him an *absolute* and *unconditional right* to the pension, from a specific day. In the language of Mr. Wirt, "The law does not require either that an application should be made by him, or that anything else should be done, in order to *consummate his right*." "It is a *vested right* to so much money per annum," from the 3d of March, 1826. The pension, from said day, has actually *accrued*, and become *due* to him, and it is *continually accruing*. Is it doing any great violence to language, to call a man a *pensioner*, who is invested by law with all the *rights* of a pensioner, and to whom a pension is daily *accruing*, although no *payment* has actually been made to him on account of his pension? May he not be called a pensioner, in the same sense that a man who is invested by law with the right to vote, may be called a "*voter*," although he has never exercised the right of suffrage? The Attorney General says the word "pensioner" "certainly does not include any but those who actually enjoy the bounty of the government in the shape of periodical payments." I admit that, if we consult the *dictionary* merely, we may not find a more comprehensive definition of the word given. But every lawyer knows that the dictionary is often a very unsafe guide in the construction of statutes. The same word may have an enlarged or limited signification, according to the connexion in which it is used, or the subject matter to which it relates; and no lexicographer can be expected to state every possible sense in which every word may be legitimately used. Webster defines the word "PENSIONER" thus: "1. One to whom an annual sum of money is paid by government, in consideration of past services. 2. One who receives an annual allowance for services. 3. A dependent."

Now, I admit that this definition may suggest the idea that an *actual payment* is necessary to constitute a man a "pensioner." But if we look at the definition, given by the same author, of the verb "*to pension*," and of the present participle, "*pensioning*," a directly contrary idea is suggested. He defines the verb thus: "PENSION, *v. t.* To *grant* a pension to; to *grant* an annual allowance from the public treasury to a person for past services, or on account of disability incurred in the public service, or of old age." According to this definition, *to pension* a man is to *grant* him an annual allowance, &c. And, surely, *to pension* a man, is to make him a *pensioner*. Again:

He defines the present participle thus: "PENSIONING, *ppr.* Granting an annual allowance for past services." The act of *pensioning* a man, therefore, consists in *granting* (not in paying) an annual allowance. And does not the act of *pensioning* a man make him a *pensioner*? The irresistible inference from both of the foregoing definitions is, that the simple act of *granting* a pension makes the grantee a *pensioner*. And who *grants* the pension, under our laws? Unquestionably, *Congress* makes the *grant*, in and by the *law*. The executive department only ascertains, by the evidence, *who are the grantees*. Neither the Commissioner who issues the certificate, nor the ministerial officer who pays the money, has anything to do with *granting* the pension.

Again: In the series of acts now under consideration, the word "annuity" is used as exactly equivalent to the word "pension." In the act of 1828, neither word occurs, the allowance being simply called "pay." But in the succeeding acts, the allowance is uniformly called "annuity or pension." Although every *annuitant* is not necessarily a *pensioner*, yet every pensioner who receives a stated sum per annum is unquestionably an annuitant. As applied to a beneficiary under these pension laws, the words are *exact synonyms*. And Webster defines the word ANNUITANT thus: "One who receives, or is entitled to receive an annuity." Now, if one who is *entitled to receive* an annuity is an "annuitant," is not one who is *entitled to receive* a pension, in the same sense, a "pensioner?"

So much for the argument drawn from the dictionary.

If it be insisted that an actual *payment* is necessary to constitute a man a pensioner, the argument proves too much; for it is admitted, that if the claim has been *allowed*, and the pension certificate has been *issued* in the lifetime of the claimant, and he has died before the payment of the money, the children are entitled to all that was due at his decease. But the man to whom a certificate has issued, but to whom no *payment* has been made, comes no more within the definition given of the word "pensioner," than the man who has not yet completed his proof.

And this leads me to the consideration of one of the strongest reasons in favor of the construction which has hitherto prevailed. It is a rule of construction, that the legislature will be presumed to have intended that a general and beneficial law shall operate *equally* upon all persons standing alike in point of *merit*, in relation to the subject-matter; and such a construction will be given as will effectuate this intention, if it can be done without actual violence to the language. In other words, the legislature will not be presumed to have intended to make a mere whimsical distinction, a "distinction without a difference," between persons whose claims stand upon equally *meritorious* grounds; and words will not be so interpreted as to produce that result, if any other interpretation be admissible.

Keeping this principle in view, let us look at the effect which will be produced by construing the word "pensioner," in the acts of 1829 and 1840, to embrace only persons to whom pension certificates have actually been issued.

A presents his claim, which is allowed; the certificate issues, and the next day he dies, without drawing his money. His children

receive the amount due at his decease B presents his claim, but dies the day *before* the certificate would have issued; and his children receive nothing. Now, every one must see that the children of A and B stand upon an equal footing in point of merit, and that the distinction which allows the claim of the former, and cuts off that of the latter, has no shadow of *reason* or *justice* to stand upon. Under the construction which has hitherto prevailed, however, no such unreasonable and unequal results could happen.

The Attorney General says, in substance, that there is no more propriety in calling a man a pensioner who is merely entitled to a pension, than there would be in calling a man a soldier, merely because he might have enlisted in the army if he had thought proper to do so. There is not the slightest analogy between the two cases, and therefore the illustration is not apposite. The pension laws now under consideration, as I have already shown, vest in the beneficiary an absolute and unconditional right to the pension; and no act is required of him to perfect that right. He is by law invested with all the *rights* and *qualities* of a pensioner; and pension money has actually accrued and is accruing to him, which will be paid over whenever he identifies himself as the person in whom the right is so vested by law. But before a citizen can become a soldier, he must perform a *condition precedent*—namely, enlist. Until he does enlist, he is invested by law with *none* of the *rights* or *qualities* of a soldier. If the pension laws now under consideration were like the act of March 18, 1818, or the various invalid pension acts, the former of which requires the claimant to make a declaration, and the latter to complete his proof, before any right shall vest in him, the illustration given by the Attorney General would be more pertinent.

The Attorney General, in reference to the act of 2d March 1829, says:

“There is one consideration which sets aside all pretence of claim under this law, in a case like the present. It provides only for the payment of *arrears*. This word has a signification as definite and well known as any other in the language. It means a balance—one portion left behind another portion—a sum still remaining unpaid after payment of a part.”

This definition *may be* critically correct, but it is not well settled by authorities. Webster, it is true, draws a distinction between ARREAR and ARREARS, thus: “A person may be in *arrear* for the whole amount of a debt, but *arrears* and *arrearage* imply that a part has been paid.” It is believed, however, that Webster stands unsupported by any other authority in this definition; and it is difficult to discover any *reason* why the *singular* should have a more comprehensive signification than the *plural*. But I am not disposed to question the critical accuracy of Mr. Webster’s definition, inasmuch as the reference to it suggests one of the very best arguments in favor of my view of the question.

It so happens that this vital word “ARREARS” *does not once occur* in the act of 19th June, 1840, the only act now in force under which anything is claimed. It occurs in the act of 1829, but that act was superseded by the act of 1840. Now, what is the legitimate inference

from this fact? It is a well-settled rule of construction, that where an old act is revised by a new one on the same subject, and the new act, in incorporating any provision of the old one, changes a material word, the change will be presumed to have been made with intent, either of altering the provision of the old law, or of *removing some doubt as to its true construction*. Now, apply this rule to the present case. The act of 1840 is a mere revision of the act of 1829. The act of 1829 used the word "arrears," but some doubt had been entertained as to its strict applicability to a case in which the *whole* pension was due and unpaid. The legitimate inference is, that Congress, in framing the act of 1840, substituted the words "amount of pension" in lieu of "arrears of pension," for the express purpose of removing this doubt.

Again: The argument drawn from Webster's definition of the word "arrears" proves too much; for it would cut off the claims of children in a case where the certificate had actually issued to the claimant in his lifetime, if no money had been paid upon it, as well as in a case which had never been allowed.

The Attorney General further says, in effect, that the acts of 1829 and 1840 cannot be construed to apply to the case of a person who was never actually *allowed*, though entitled to, a pension in his or her lifetime, because they provide for the payment of the amount "*due*" the pensioner, &c. And he assumes that nothing can be *due* until the name of the claimant is actually inscribed on the pension roll. I have already shown the error of this assumption. The pension which has accrued from the time specified in the act for its commencement to the last semi-annual pay day is just as much a sum *due* the beneficiary before his name has been placed on the pension roll as afterwards. You might just as well say that a note is not *due* till a *judgment* is rendered upon it, as to say there is nothing *due* a person entitled to the benefit of one of these pension laws till his claim is actually *allowed* by the department.

The Attorney General refers to the act of 4th July, 1836, to show that "Congress knew very well how to describe a revolutionary soldier who died without getting a pension." "In that act," he says, "they do not speak of him as a *pensioner*, nor call the claim of his widow or children a *pension due*."

Surely the Attorney General must have had a very obscure idea of the scope and effect of said act of 1836. It does not give, nor purport to give, to the widow or children *anything that the soldier ever had the slightest claim to in his lifetime*. The third section gives to a certain class of widows, whose husbands were *not* entitled under the act of 7th June, 1832, because they were *not living* when said act passed, the pensions that they *would have been* entitled to under said act, "*if living at the time it was passed*." The Attorney General, however, doubtless had particular reference to the *second* section of said act, although he has inadvertently cited it as the *fourth* section. But the second section does not, any more than the third, give or purport to give to the widow or children anything to which the soldier, in his lifetime, ever had *any right or claim*. The act of 7th June, 1832, gave to officers, soldiers, &c., "then surviving," pensions, to commence on the

4th of March, 1831. The second section of the act of 1836 gives to the widow or children of any soldier who had died *since the 4th of March, 1831, and before the date of said act of June 7, 1832*, the amount of pension which *would have accrued* from the fourth day of March, 1831, to the time of his death, and become payable to him by virtue of that act, "*if he had survived the passage thereof.*" It is as clear as a sunbeam that this act provides only for the widows and children of soldiers who never were entitled to any pensions in their lifetimes. But what is claimed under the acts of 1829 and 1840 is the pension to which the soldier *was* confessedly *entitled* in his lifetime, although he never got it. To show, therefore, that a soldier who never had any *right or claim* to a pension is not called a "pensioner" proves nothing and illustrates nothing. Nor does it prove or illustrate anything to show that the amount given to the widow or children by the second section of the act of 1836 is not called "pension due," for the very good reason that it is something which the soldier never had the *slightest claim to* in his lifetime.

Although a clear comprehension of the provisions of said act of 1836 utterly annihilates the argument which the Attorney General has sought to predicate upon it, yet the second section of said act is entitled to great consideration, as showing what Congress evidently *understood* to be the rights of widows and children whose husbands or fathers had died *entitled* to pensions under the act of 1832. For unless Congress had supposed that widows or children could recover the back pension to which a beneficiary under said act should die *entitled*, it is inconceivable that they should have thought of giving them this little fraction, from the 4th of March, 1831, to the death of the soldier, where he died between the said 4th of March, 1831, and the 7th of June, 1832, and, *on that account*, was *not entitled* under the last mentioned act. Congress never would have been guilty of the patent absurdity of giving to the widow or children the pension from the 4th of March, 1831, to the death of the husband or father, in a case where he was *not entitled* to it in his lifetime, and withholding it from them in a case where he *was entitled* to it.

I have thus far, in examining the question of the true construction of the acts of 1829 and 1840, treated it as if it were a new question, now for the first time arising under said acts. It will be seen that the whole question turns upon the point whether the word "pensioner," as used in said acts, can be legitimately construed to embrace the case of a person who was *entitled to*, but never actually *paid*, a pension, under any of the pension laws embraced in the series commencing with the act of May 15, 1828. I trust I have shown that the construction, even at its inception, was not altogether unreasonable. Nay, more; I think I have shown that, inasmuch as it was the only construction which could prevent said acts from operating with gross inequality upon persons standing in the same degree of merit with reference to the subject matter, it was, in fact, a construction eminently "fit to be made."

But I now come to consider the question as to the effect which ought to be given to a contemporaneous construction uninterruptedly pursued by the executive departments for more than twenty-eight years, and

impliedly sanctioned by Congress in instances almost innumerable. And here I must express my profound astonishment that the Attorney General should have entirely overlooked this controlling argument in the case. I must express my surprise, also, that that distinguished legal officer should have, with apparently so slight an investigation of the matter, arrived at the conclusion that all the officers of the government charged with the execution of these laws through so long a series of years, had been paying out millions of money without the slightest shadow of warrant in law for so doing. I can only account for it by supposing that the honorable Attorney General, in the midst of pressing business, has too precipitately adopted the views of some subordinate, on whose judgment and legal ability an undue estimate had been placed.

The fact that the construction now contended for has prevailed ever since the passage of the act of March 2, 1829, is too notorious to require any proof. In fact, the Attorney General admits that "the practice of allowing these claims has prevailed in the Pension Office for twenty-five years." And this practice has not been permitted to prevail in the Pension Office without attracting the scrutiny of the higher executive officers. It has not related to an obscure or unimportant subject. On the contrary, it is a practice under which claims have been almost *daily* allowed during the whole time it has prevailed, and millions of dollars have been paid out under it. It has time and again been subjected to the scrutiny of heads of departments and attorneys general, and been expressly sanctioned by them.

I have now before me a copy of the "Regulations" prescribed by General Cass, then Secretary of War, for carrying into effect the act of June 7, 1832, which is dated the 27th of the same month. One of these regulations is in these words:

"No payment can be made on account of the services of a person who may have died before the taking effect of the act of June 7, 1832; and in case of death subsequent thereto, *and before the declaration herein required is made*, the parties interested will transmit such evidence as they can procure, taken and authenticated before a court of record, showing the services of the *deceased*, the period of his *death*," &c.

This practice was expressly and emphatically sanctioned by Mr. Attorney General Butler, on the 12th of April, 1837, although the present Attorney General says (erroneously) that it was *denied* by him. The following question was submitted to him by the Secretary of War:

"Can the children of a widow, who was living on the 4th of July last (1836) and was entitled to the benefits of the third section of the act, now draw the amount due up to the date of her death, *although she failed to apply?*"

And this question Mr. Butler answered in the *affirmative*. He says:

"According to several opinions heretofore given in this office, especially in navy pension cases, the right of the widow under the act is to be regarded as a vested interest accruing on the passage of the law, *and not defeated by the omission to apply for it*," &c.—(Mayo & Moulton's Pension Laws, 410.)

On the 25th of May, 1840, Mr. Attorney General Gilpin decided,

in the case of Mary Updegraff, who died before the pension was allowed, that the amount accruing to the time of her death was payable to her children, expressly referring to the act of March 2, 1829, as applicable to and governing the case.—(Mayo & Moulton, 422.)

In 1839, Mr. Woodbury, then Secretary of the Treasury, expressed a doubt as to the legality of the practice, and suspended a requisition, in the case of Jesse Gove, until the matter could be inquired into. Upon being informed by Mr. Poinsett, Secretary of War, that the allowance was in accordance with “the *invariable practice* of this [the War] Department under my [his] predecessors and the united opinions of Mr. Attorney General Wirt and Mr. Attorney General Butler,” Mr. Woodbury waived all objections and let the claim pass.—(Mayo & Moulton, 493.)

On the 5th of March, 1850, Mr. Ewing, Secretary of the Interior, in the case of Elizabeth Thom, decided that the pension which accrued, but was not allowed to the decedent in her lifetime, was a *vested right*, which descended to her personal representatives, although no children survived.—(Mayo & Moulton, 519.)

On the 5th of November, 1850, Mr. Stuart, Secretary of the Interior, in the case of Polly Knight, decided that a pension accruing under the act of 1836 was not forfeited by the failure of the widow to claim it in her lifetime, thereby overruling an *obiter dictum* to the contrary by Mr. Attorney General Crittenden. The case had been referred to Mr. Crittenden for his opinion on another question, but he had thrown out the suggestion that the claim of Mrs. Knight had been forfeited by her failure to assert it in her lifetime. On this point Mr. Stuart, after remarking that he does not deem that a question necessary to be considered in the case, says: “But, in view of the repeated decisions of that question in opposition thereto, [to Mr. Crittenden’s suggestions,] and the long-continued and uniform course of practice under said decisions, I am constrained to dissent from that part of the Attorney General’s opinion.”

This question was again reviewed by Mr. Attorney General Cushing in 1856 in the case of the children of Jesse Lovering, (7th vol. Op. Attys. Gen., 717.) So far from having “denounced” the practice “as illegal,” he *sustained* it by an able and conclusive argument. True, he thought the practice *originated* in a doubtful, or rather “forced” construction of the acts of Congress, but he nevertheless argues that, by long and uninterrupted usage, and by the acquiescence in and implied sanction of that usage by Congress, said construction has become established law. Accordingly he expressly advised the Secretary of the Interior to *continue* the practice.

The case of Jesse Lovering’s heirs was as follows: Jesse Lovering was entitled to a pension under the act of 1832, but died in 1844, without having asserted his claim. He left children who, after his death, applied for the pension due at the time of his decease. The question as to their right to recover was referred to Mr. Attorney General Cushing by the Secretary of the Interior. Mr. Cushing, in his opinion, states the question submitted to him to be, “how far a pension not claimed, and of course neither certified nor adjudicated,

but which, it now seems, if claimed, would have been allowed, is to be considered as a *vested interest* of the party as property demandable by representative persons?"

After referring to a former opinion given by him as to the construction of certain *invalid* pension laws, in which he held that under said *invalid acts* no rights survived to the children, he says:

"My examination of the statutes led me to the belief that their construction ought *probably* to have been the same in regard to revolutionary pensions, *yet that it had not been*; but, on the contrary, the unsatisfied right of pension had been constantly held to be claimable by certain representative persons, though by rather forced construction of the acts of Congress. That such has from the beginning been the received construction of the law is proved by what occurred when it was called in question by the Secretary of the Treasury, (Mr. Woodbury,) so long ago as the year 1839, and the inception of the practice was explained by Commissioner Edwards. To the same conclusion is the declaration in 1850 of the Secretary of the Interior, (Mr. Stuart,) who, in disposing of Polly Knight's case, negatived an *obiter dictum* to the contrary at the close of Mr. Crittenden's opinion in that case.

"Finally, the same point is thoroughly established by the complete and comprehensive statements of the late commissioner, (Mr. Waldo,) in Wheeler's case, and of the present, (Mr. Minot,) in the case of Oo-la-yah-tah." He says that in the examination of the last mentioned case, he felt "constrained to yield, so far as regards the matter of revolutionary pensions, to the maxim *stare decisis*, and to concede that the allowance of unclaimed pensions of that character to certain representative persons, *is the established rule of the government*, and to content myself with advising that the rule, as thus fixed by long practice, shall be *acquiesced in*, but rigidly confined, meanwhile, within the narrowest possible limits. *I continue after further reflection of the same sentiment on both points.*"

Again, he says: "After a continuous series of uniform decisions on a point, in numerous cases, and for many years, under successive administrations of the subject matter, it seems to me hardly worth while to recur to doubts of mere statute construction, not involving any question of constitutionality, or of grave public or private wrong. Time and tide cannot pause long enough to admit of the re-examination and re-settlement of all these ordinary administration matters. Besides, it tends to grievous fluctuations in the Executive business."

As the claims of *grandchildren* to the arrears of unclaimed pensions were not thus supported by long and uniform practice, Mr. Cushing advised against their allowance. But so far as the claims of *children* are concerned he could not have given a more decided opinion as to their validity. He takes the true ground, that however doubtful the construction which gave them this right may have been *originally*, it has, by repeated decisions, long practice, and legislative acquiescence, become the settled and established law of the land.

Yet Mr. Attorney General Black says that this practice was "denounced as illegal" by Mr. Cushing. Can it be possible that he ever read Mr. Cushing's opinion? Nothing could be more unfair

than Mr. Attorney General Black's reference to the opinions of Messrs. Woodbury, Butler, and Cushing. He says the practice of allowing these claims to children "was doubted, however, by Mr. Woodbury, *denied* by Mr. Butler, and *denounced as illegal* by Mr. Cushing;" thus arraying all these distinguished names against the legality of the practice.

The facts are, that although the legality of the practice was called in question by Mr. Woodbury, yet, after having been advised of the opinions of Attorneys General Wirt and Butler on the subject, and the long usage pursuant thereto, he *acquiesced* in the practice.

Mr. Butler, instead of *denying* the legality of the practice, *affirmed* it in the most positive manner, and without the expression of a *single doubt* on the subject.

Mr. Cushing, instead of "denouncing" the practice "as illegal," demonstrated its present legality by an able and unanswerable argument.

If we go back to the decisions under the navy pension laws, where the principle involved was the same as under the revolutionary acts now in question, the practice has continued, without interruption, for *near half a century*. It has been affirmed and sanctioned by Secretaries of the Navy Department, the Treasury Department, the War Department, and the Department of the Interior, and by at least four Attorneys General. And the only opinion of an Attorney General against it (prior to Mr. Black's) is the *obiter dictum* of Mr. Crittenden in Polly Knight's case, which was promptly overruled by the Secretary of the Interior.

But the sanction of this practice has not been confined to the Executive Departments alone. Congress has annually appropriated large sums of money for the payment of revolutionary pensions, with a full knowledge that large portions of the same were being applied to the payment of widows, children, &c., in cases where the party entitled had died without establishing a claim. Not only so, but it is believed that at every session Congress, has by special acts allowed more or less claims of this character, which had been disallowed by the department, on account of some informality or supposed insufficiency of the evidence. Congress could not be ignorant of the fact, that claims of this character were being daily allowed by the department; for it is notorious that a large proportion of these claims were prosecuted by the members themselves—not for any fee or reward, but for the accommodation of their constituents.

There is one view, however, in which the legislative exposition which has been given to the acts under consideration is, upon one of the plainest principles of law, entirely conclusive of their true legal construction.

It is a well known rule of construction, that when a subsequent act adopts the *same word* which had been used in the same connexion in a prior act on the same subject, and which word, under the prior act, had received a settled and well known *construction*, the legislature will be presumed, in adopting the *word*, to have adopted such *construction* also.

Now, apply this rule to the question under consideration. The act

of 1840 relates to the same subject matter as the act of 1829, and is, in fact, a mere revision of it. When the act of 1840 was passed, the act of 1829 had been in force *eleven years*, and during all that time the word "pensioner," as used in it, had been construed to apply to and embrace the case of a person fully *entitled* to a pension, though he had never *received* it. In the act of 1840, Congress adopts the *same word* in precisely the same connexion and in relation to the same subject-matter. Is it not a manifest absurdity to say that Congress did not intend that the same construction should be given to it which had so long, so uniformly, and so *notoriously* prevailed under the act of 1829? No lawyer will question the correctness of the *rule* as above laid down, and it does not require the aid of a legal vision to perceive its strict and controlling *applicability* to the case under consideration.

Again: Congress passed, successively, the acts of 15th May, 1828, 7th of June, 1832, 4th of July, 1836, 7th of July, 1838, 29th of July, 1848, &c., well knowing at the time of passing each successive act what practice had prevailed under the prior acts of the series in reference to the question now under consideration. Was not their failure to insert any provision expressly repudiating that practice, in each of these successive acts, equivalent to a direct recognition and sanction of such practice?

In one of these acts Congress has *expressly* sanctioned and adopted this practice. In the second section of the act of 29th July, 1848, it is expressly provided, "that the same rules of evidence, *regulations*, and *prescriptions*, shall apply and govern the Commissioner of Pensions and pension agents under this act *as now prevail* under existing pension laws which relate to widows of revolutionary officers and soldiers." I have already shown that among the *regulations* and *prescriptions* then prevailing was the rule for paying the back pension to children, where the widow died without establishing her claim.

Surely, if ever a question was definitely settled by contemporaneous construction and legislative exposition, it is the very question now under consideration. However questionable the construction given to these statutes may have been in the first instance, it is now upon one of the plainest principles of law, settled and established beyond the legitimate control of any power short of the legislative.

The rule of law applicable to such cases has been so often and so clearly laid down by the highest judicial tribunals, and is so familiar to every professional lawyer, that I must apologize to that class of readers for here referring to a few authorities in point.

In a case decided by the Supreme Court of the United States, the question was as follows: A law of Pennsylvania, of 1715, required deeds to be acknowledged or proved "*before one of the justices of the peace of the proper county.*" The deed in question had been acknowledged before a *supreme judge* of the State. Chief Justice Marshall, in delivering the opinion of the court, said: "Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be, that the deed was not regularly proved. A judge of the Supreme Court would not be deemed a justice of the county, and the decision would be that the deed was not regularly proved, and therefore not legally recorded." But it having been shown that

the practice had long prevailed in Pennsylvania of acknowledging deeds before the Supreme judges, and had received the implied sanction of the judicial tribunals of that State, the court decided that the practice must prevail over the strict letter of the law.—(McKeen *vs.* Delancy, 5th Cranch, 22.)

In another case, the Supreme Court of the United States has said :

“In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.”—(Edwards *vs.* Darby, 12 Wheat., 206.)

The supreme court of Massachusetts, in a case which turned upon the construction of a single word in a statute, and which construction they sustained upon the sole ground of long continued usage, says :

“Although, if it were now *res integra*, it might be very difficult to maintain such a construction, yet we cannot shake a principle which has so long and so extensively prevailed. If the practice originated in error, that error is now so common that it must have the force of law. The legal ground upon which this principle is now supported is that long and continued usage furnishes a contemporaneous construction which must prevail over the *mere technical import of words*.”—(Rogers *vs.* Goodwin, 2 Mass., 475.)

Again, the same court has said :

“A contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms made use of by a legislature. If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law, and after it has been acted on for a century, nothing but legislative power can effect a change.”—(Packard *vs.* Richardson, 17 Mass., 144.)

“In construing ancient statutes, contemporaneous construction, as evidenced by usage, will not be departed from without the most cogent reasons ; and if the construction be doubtful, usage will control.”—(Chestnut *vs.* Shane, 16 Ohio Rep., 599.)

Strange as it may appear, that the Attorney General, in considering this question, should have ignored the effect of a contemporaneous construction sanctioned by a practice of so many years, it is still more strange that he should have totally disregarded a recent decision of the Supreme Court of the United States on the precise question submitted to his consideration.

The case of Walton *vs.* Cotton, (19 How., 355,) may be briefly stated as follows :

The administrator of a widow who had died entitled to a pension under the act of 1836, but which had not been allowed in her lifetime, had received the amount due at her death for the benefit of her children, pursuant to the then prevailing practice in the Pension Office. She had left, as her heirs-at-law, both *children* and *grandchildren*, and the latter had claimed a distributive share of the money from the administrator, and brought suit to recover it in a State court of Tennes-

see, where the parties resided. The supreme court of Tennessee having decided against the claim of the grandchildren, the case was brought before the Supreme Court of the United States by a writ of error, under the twenty-fifth section of the judiciary act of 24th September, 1789; and that court decided that the grandchildren were entitled, *per stirpes*, to share the money with the children.

The Attorney General assumes, however, that because "the money had already been paid by the government," the court did not consider or adjudicate the question, whether *either party* was entitled to the money, *as against the government*. He says: "both sides admitted it to have been rightly paid. There was no dispute except about the division. In such case, the court could not go behind the issue made by the parties themselves."

That the Attorney General has fallen into a most transparent error, in this view of the subject, must be manifest to every lawyer. The clause of the judiciary act which gave the Supreme Court of the United States *jurisdiction* of the case, is so much of the twenty-fifth section as provides "that a final judgment or decree in any suit in the highest court of law or equity in any State," &c., "where is drawn in question the construction" of any clause of any "*statute of the United States*, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said statute, may be examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error," &c.

Now, in the case of *Walton vs. Cotton*, the construction of the statutes of the United States relating to the payment of pensions had been "drawn in question," and the decision of the State court had been against the right set up by the grandchildren under said statutes. This, and this only, gave the Supreme Court of the United States *jurisdiction* to consider the case on the writ of error. To give a construction to said statutes of the United States, was the *only purpose* for which said court could legally or constitutionally take jurisdiction. Although "the money had already been paid by the government," and the question was only one as to its distribution, yet *unless that distribution could be made under and by virtue of the statutes of the United States*, it is very clear that the Supreme Court of the United States had no jurisdiction to make it at all. A State court might distribute a fund in the hands of an administrator, in accordance with the statutory laws of the State, or upon common law principles, without taking into consideration what right the administrator had to collect it. But the Supreme Court of the United States could have jurisdiction of this fund for no other purpose but to *declare the rights of the parties under and by virtue of the statutes of the United States*.

But the Attorney General thinks that, because the question of jurisdiction was not raised by "the issue made by the parties themselves," the court could not "go behind" that issue and consider it. It is sufficient to confront this assumption with what the Supreme Court itself has repeatedly said on this very point. Scarcely any proposition has been more frequently decided by said court, than that it will not entertain jurisdiction of a case coming before it from a State court, on writ of error, if it appears, on an examination of the case,

that their jurisdiction is not clear ; even although the parties have not only omitted to "make the issue," but where they have *expressly waived* the question of jurisdiction.

In a case which came before said court by writ of error, from the supreme court of Illinois, Chief Justice Taney, in delivering the opinion of the court, said :

"It is true that the plaintiffs and defendants have both waived all objections to the jurisdiction, and have pressed the court for a decision on the principal points. But *consent will not give jurisdiction*. And we have heretofore, on several occasions, said, that when the act of Congress has so carefully and cautiously restricted the jurisdiction conferred on this court, over judgments and decrees of the State tribunals, it would ill become the court to exercise it in a different spirit."—(Mills *vs.* Brown, 16 Pet., 525.)

The Attorney General pays but a poor compliment to the Judges of the Supreme Court, by assuming that it never entered their minds, in the case of Walton *vs.* Cotton, that they could take jurisdiction of the case for no other purpose but that of giving a construction to the acts of Congress out of which the rights of the parties sprung.

But it is a waste of time to argue further, that the court was in *duty bound* to give a construction to the acts of Congress in question ; for it appears, from the report of the case, that the court *actually did* refer to and comment upon said acts, and *expressly* base its decision upon a construction of their provisions.

J. J. COOMBS.

NOTE.—It will be perceived, (incidentally,) by reading the foregoing pages, that the practice has not been uniform, as to paying back pensions to any other class of heirs or representatives, except *widows* and *children*. Until Mr. Marcy decided to the contrary, in 1845, the practice had been uniform of paying to the executor or administrator (for the benefit of grandchildren or collateral heirs) in case no widow or child survived. Since then, however, a contrary practice has prevailed, except for a short time in 1850-'51, when, under a decision of Mr. Ewing, the old practice was reinstated. During *all the time*, however, the practice has uniformly prevailed of paying to the *widow*, if any, and if no widow, to the *children*. I have intentionally avoided discussing the question as to the rights of grandchildren or personal representatives, where no widow or child has survived, as my object was simply to review the opinion of the Attorney General, which cuts off *all* claims—as well those of widows and children, as grandchildren and personal representatives.

NOTE SECOND.—It is worthy of remark, that while the argument of the Attorney General is based almost exclusively on the technical objections, that the word "*pensioner*" cannot be construed to apply to a person who was never in receipt of a pension, and that the word "*arrears*" cannot be construed to apply to a sum of money which remains *wholly* unpaid, yet in the case before him and in which the opinion is given, according to his own statement of it, neither of these technical objections existed. It was a case of *increase*

of pension. The decedent had been in receipt of a pension (though not a full pension) in her lifetime. She was therefore a "*pensioner*," according to the strict definition of the word, as given by the Attorney General. She had also, in her lifetime, received a *part* of the pension to which she was entitled. What remained behind, therefore, was "*arrears*," according to his own definition of that word. Not deeming, however, that there is any well-founded reason in law for making a distinction between a case of increase and a case never allowed at all, I have not noticed this point in the body of the foregoing review.

OPINION OF THE ATTORNEY GENERAL.

ATTORNEY GENERAL'S OFFICE,
September 19, 1857.

SIR: I have received your letter on the application made by the grandchildren of Deborah Grant for the pension to which they allege she was entitled, and have examined the papers by which it was accompanied.

Mrs. Grant first began to receive a pension in 1839; it was increased in 1841; and in 1853 she applied for a still further increase, alleging that the services performed by her husband entitled her to a larger pension than either of the previous decisions of the office had given her. Pending this last application, she died, leaving grandchildren, but no children, living. The grandchildren now renew the application.

As to the increase applied for in 1853, but never allowed, that must be regarded as an unestablished claim to a pension. The mere application made in her lifetime does not make the right of her children any better than it would have been if she had never applied at all.

I take it for granted that her grandchildren have proofs sufficient to show that she in her lifetime was entitled to receive what they now claim as her representatives. Nor will I stop to discuss the question whether the grandchildren of a pensioner have or have not the same rights that children have. It is settled by the Supreme Court (19 Howard, 355) that they stand on equal ground. What has been decided by that tribunal is not, and ought not to be, open to further dispute.

It is also very clear, that pensions due to widows will descend to their children or grandchildren, just in the same way that pensions coming to revolutionary soldiers themselves will descend to theirs.

These principles, being thus settled, the case before me, and the question arising on it, may be put thus: A soldier of the revolution, who might have got himself placed on the pension roll, and received from the government a pension during his natural life, has died without doing so. Can his children, after his death, get all that he might have got in his lifetime, on the production of the same proofs?

Before this question can be answered in the affirmative, the right of

the children must be shown by some act of Congress which gives it to them either expressly or by very clear implication. The non-existence of a law to forbid it proves nothing. Every claim upon the public money must be made out affirmatively by the claimant. The burden of proving that such a demand is *not* well founded never lies upon the Government. No man can be allowed to take from the Treasury what Congress has not given; and Congress gives nothing, except when the intention to do so is expressed in plain and unambiguous words.

It is utterly in vain to argue that the annuity which the law authorizes a soldier to receive is property in which he has a vested right, and descendible like money secured to him by a bond. It is not so. If it were, Congress would have no power to say whom it should go to after the death of the pensioner, for Congress cannot regulate the descent or distribution of property in the States. It would necessarily pass by the law of succession which prevails at the place of the pensioner's domicil. But it is a mere gratuity which the Government may and does bestow on whom it pleases. If it be not extended beyond the immediate object of the bounty, his representatives can have no interest in it. If it be so extended, the representatives take it as a favor, and not of right. It is for this reason alone that Congress without regard to the law of the States, has always exercised the power of saying to whom the arrearages of a pension shall be paid when the pensioner dies. It is given to a widow in exclusion of children, and in other cases to children in exclusion of collateral kindred and creditors. This right of bestowing it on some classes of relatives, while others, equally entitled in justice and preferred by the general rules of law, are forbidden to enjoy it, springs entirely out of the right to withhold it from all of them. It follows, that if the children of a revolutionary soldier can get the pension due to their ancestor, they must get it in pursuance of some positive law to that effect. Nothing remains, therefore, but to see whether Congress has made any provision which authorizes the children of a deceased soldier to prove the services of their parent, and get the pension which might have been awarded to him.

The second and third sections of the act of 1836 (5 U. S. L., 128) were manifestly and plainly intended to give certain representatives of deceased soldiers the privilege of establishing claims never established by the soldiers themselves. But the second section does not cover this case, because it refers only to those soldiers who died between the 4th of March, 1831, and the 7th of June, 1832. The third section is equally inapplicable; for it was intended solely to substitute the widow of a soldier as a pensioner in his place, upon proof by her of his services. Children are not spoken of.

The act of 1832 (4 U. S. L., 530,) in the fourth section, provides for the case of a pensioner dying between the semi-annual pay days, and directs that the proportionate amount accruing between the last pay day and the time of his death shall be paid to his widow, or, if he left no widow, to his children. This refers so clearly to a pensioner actually put on the roll in his lifetime, that nobody pretends to claim anything under it for the children of a soldier who died without being a pensioner. If there were no other law on the subject, I should have

my doubts whether the children of a pensioner could recover for what accrued further back than from the last pay day before his death, though one or several full payments might be due.

But the act of 1829, section 1, (4 U. S. L., 350,) declares, that “whenever *any* revolutionary pensioner shall die, the *arrears* of pension *due* to the said pensioner at the time of his death” shall be paid to his widow, or if he left no widow, to his children. There is one consideration which sets aside all pretence of claim under this law in a case like the present. It provides only for the payment of *arrears*. This word has a signification as definite and well known as any other in the language. It means a balance—one portion left behind another portion—a sum still remaining unpaid after payment of a part. Unless a pensioner received a part of his pension during his life, (and he could not do that without being on the pension roll,) there can be no such thing as *arrears* at his death. There are other reasons equally potent in favor of the same construction, but they will be embraced in what I have to say about the act of 1840.

That act (5 U. S. L., 385) provides for the case of a *pensioner* who dies, leaving a widow, and for the case of a *pensioner* who is a widow, but dies leaving children; and in both cases it says that “*the amount of the pension due to such pensioner at the time of his (or her) death*” shall be paid for the sole use of the children. It is incomprehensible how this law ever came to be understood as it has been by some of the officers of the pension bureau. There is not a word in it which could properly have been used to express the intention that children shall have the privilege of establishing a claim which their parent never made good.

For whose children does the act provide? For the children of pensioners. And who is a pensioner? One who receives a pension. It certainly does not include any but those who actually enjoy the bounty of the government in the shape of periodical payments. To say that a person is a pensioner for the reason that he might have become one by an act of his own, would be as gross a violation of the *jus et norma loquendi* as to call a man a soldier merely because he might have enlisted in the army if he had thought proper to do so.

But again: What is it that the act of 1840 gives to the children? Not the sum which their father or mother might have claimed and got, but the amount of *pension due* at the pensioner's death. An amount *due* is a sum presently payable, and implies that a time of payment has been fixed and fully expired. *The amount of pension due* means nothing, unless it means the amount of a gratuity payable at certain periods, but still remaining unpaid, although the time or times designated for its payment have gone by. There never was a revolutionary soldier who would have called himself a *pensioner*, or demanded anything as *due* upon a pension, before it was allowed and established, and a time fixed for paying it.

This is not all. The law of 1836 shows that Congress knew very well how to describe a revolutionary soldier who died without getting a pension. In that act they do not speak of him as a *pensioner*, nor call the claim of his widow or children a *pension due*; but “*any officer, non-commissioned officer, musician, soldier, &c., whose services in the*

revolutionary war were such as specified in this act of 1832," and who died within a certain time, to his widow or children shall be given the amount of pension *which would have accrued, &c.*

In the fourth section the soldier is described as "any person *who served* in the war of the revolution in the maner specified in the act of 1832," and to his widow is granted "the annuity or pension *which might have been allowed* to her husband." I have quoted this law for the purpose of showing that when Congress chose to provide for the widow or children of a soldier who had no pension in his lifetime they did so in words far different from those employed in the act of 1840.

I have now referred to and examined all the acts of Congress upon the subject, and I am brought to the conclusion that none of them will enable the children or grandchildren of a revolutionary soldier to sustain a claim against the government, based on the mere fact that their ancestor performed services for which a pension might have been allowed him.

But the Supreme Court is thought by some to have decided the contrary in *Walton vs. Cotton*, (19 Howard, 355.) I do not so understand that case. There was no such point in it. Nothing like the question I have been considering was raised, or discussed, or adjudicated. The Pension Office had permitted the administrator of a soldier's widow to apply for and recover a pension which had never been allowed to his decedent, and the only dispute was whether the living children should keep it all, or whether the distribution should be among the children and grandchildren *per stirpes*. The court decided in favor of the grandchildren's right to share it. The money in controversy had already been paid by the government, and both sides admitted it to have been rightly paid. There was no dispute except about the division. In such case the court could not get behind the issue made by the parties themselves. If the government had been legally there objecting to the right, I do not doubt that the decision would have been against both.

But the practice of allowing these claims has prevailed in the Pension Office for twenty-five years. It was supposed to be sanctioned by the high authority of Mr. Wirt, and certainly had the approval of Mr. Poinsett. It was doubted, however, by Mr. Woodbury, denied by Mr. Butler, and denounced as illegal by Mr. Cushing. Still it has maintained its ground in the office down to the present day.

Shall this practice continue? This is a question of mere administrative discretion which you must answer. I think I have shown that it is not supported by any law; and, under our system of government, to pay out public money without law is to pay it against law.

I am, respectfully, yours, &c.,

J. S. BLACK.

Hon. J. THOMPSON,
Secretary of the Interior.

IN THE COURT OF CLAIMS.—No. 523.

JAMES THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.*Brief of the United States Solicitor.*

This claim arises under an act of May 15, 1828, which gave to each of the surviving officers of the continental line in the revolution entitled to half-pay by the resolve of October 21, 1780, "the amount of his full pay in said line, according to his rank in the line," with a proviso, however, that he should not receive "a larger sum than the full pay of a captain in said line."

Dr. Thacher was a regimental surgeon in the army of the revolution, and his pay exceeded that of any captain; and the executive departments, in adjusting his claim under this act, have taken the pay of a "captain in said line" to be \$40 per month. It is contended by the petitioners that this decision is erroneous; that some captains in the continental line received \$50 per month; and that Dr. Thacher was entitled to the highest rate received by any captain in the continental line.

It is true, that while captains of infantry received but \$40 per month, captains of engineers, artillery, and cavalry received \$50; and two questions therefore arise:

1st. Whether captains of engineers, artillery, or cavalry were captains "in said line," within the meaning of the proviso? And

2d. If they were, does their pay constitute the limit imposed by the proviso, or is that limit the pay of infantry?

The word "line," even when used in a military sense, has various significations according to the facts to which it is to be applied.

In James' Military Dictionary, an English work, the line is said to embrace the numbered or marching regiments; and, again, to include *regulars*, except light troops, and similar corps, and excluding volunteers, militia, marines, &c.; and it further appears that certain troops may acquire that designation when serving *in the line*, and lose it when on other service. In the British service, the line might include some cavalry and artillery.

Our army in the revolution was modeled after the British, and Duane, who was an officer of the American army in the revolution, and published a military dictionary, copied James' definition of the "line." The State quotas of troops, which are uniformly designated in the resolutions of Congress as the State lines, and which, in the aggregate, constituted the continental line, embraced cavalry and artillery as well as infantry. It is undeniable, therefore, that captains of cavalry and artillery were captains in the continental line, and it was to such only that the act of May 15, 1828, gave pensions.

But where captains received different rates of pay, the grant of the pay of captain does not necessarily relate to the highest pay of a captain.

Surgeons in the army of the revolution were entitled to the half-pay of captains under resolution of January 17, 1781, and their half-pay, under that resolution, was computed at the rate of infantry pay, \$40 per month. (Secretary of the Treasury, October 22, 1834, Mayo & Moulton, p. 502.) This has the force of a contemporaneous ascertainment of the "pay of a captain."

Another decision on this point is found in 10 Peters, 647, *Wetmore vs. The United States*. The plaintiff in error being entitled to the pay and emoluments of a major, claimed to be paid as a major of cavalry, instead of a major of infantry. The court remarking that infantry constituted the main body of modern armies, said: "We think military men must so understand it, because, in this, as in all other cases where distinct parts form the minor portion, the larger or main body is understood without particular designation, and the minor requires it, to ascertain with certainty what part is referred to as spoken of."

This reasoning would seem to be conclusive of the case, but the action of the department in executing the act of 1828 has not been in strict conformity with this decision of the Supreme Court in the case cited. For, according to that, the limit imposed by proviso in the act of 1828 is the pay of a captain of infantry, and as this limit is imposed upon every officer without distinction claiming pension under the act, it would follow that captains and higher officers of cavalry and artillery could not receive more than the pay of a captain of infantry, \$40 per month, and yet they have been allowed the pay of their own corps, \$50 per month. The proviso purports to fix one certain sum beyond which no pension can go, and it is difficult to perceive how this maximum can be construed to vary in different cases. There might have been reason in construing the limit according to the pay in the several corps, giving the infantry surgeons the pay of infantry captains, and artillery surgeons that of artillery captains; but such was not the course pursued by the Pension Office; nor would it benefit the present case, as Dr. Thacher was an infantry surgeon.

Again: the act of June 7, 1832, (4 Statutes, 529,) was passed for the benefit of officers and soldiers who had not served so as to be entitled to pensions under the act of 1828. The same limitation was imposed upon pensions; they were not to exceed the pay of a captain, and yet, under the act of 1832, surgeons were allowed the maximum of \$50 per month. The difference between the two acts on which this distinction was made, is discussed in letters of the Commissioner of Pensions of March 15, 1843, and February 13, 1844, (Mayo & Moulton, 500, 501.) These letters show that the decision of the department in favor of the larger allowance to surgeons was not finally given till the year 1843.

A strict construction of the act of 1828 would exclude surgeons, as they were not "entitled to half-pay by the resolve of October 21, 1780," but, with others of the hospital department, were allowed half-pay by the resolution of January 17, 1781. But see, on this subject, the memorial from the hospital department and letter of General Washington, referred to in the proceedings of Congress of January 17, 1781, of which copies have been obtained from the Washington Papers in the State Department, and are on file in the case of *George Stevenson's heirs vs. the United States*, pending in this court.

The solicitor contends that the decision of the department under the act of 1828 was correct beyond any doubt, except such as is thrown upon it by the subsequent more liberal decisions in other cases.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.—No. 523.

JAMES THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.*Deputy Solicitor's brief on reargument.*

On the first argument, the defence to this action was placed on two grounds: first, that, in fact, Dr. Thacher never was within the description of the act of 1828, under which the claim is made; and, second, that he received, during his life, all that he could have been entitled to under that act. I have but a few words to add upon these points.

As to the first point.

The act of 1828 only includes those officers who were "entitled to half-pay by the resolve of October 21, 1780." Although surgeons are mentioned in that resolve as belonging to the regiments, a true construction of it does not include them in the promise of half-pay.

In the year 1780 Congress was engaged in the work of re-modelling the army. On the 15th of July (3 Journals, 488) they arranged the quartermaster department; on the 30th of September (*id.*, 526) the medical and hospital department; on the 3d and 21st of October (*id.*, 532, 538) the regiments or line of the army; on the 30th of November (*id.*, 521) the commissary department.

A separate clause in the resolve of October 21, 1780, or perhaps it might be called a separate resolve of that date, promises half-pay to the "officers" who should remain in service to the end of the war.

As surgeons are named in the resolve of October 21 as belonging to the regiments, it is plausibly contended that even if the promise of half-pay in that resolve be confined to the officers therein mentioned the surgeons will still be included.

But, in fact, Congress intended neither to confine the promise of half-pay to the officers mentioned in the resolve, nor to extend it to all therein mentioned. The history of the half-pay system places this beyond doubt.

It is historically known that the half-pay establishment was adopted by Congress upon the urgent solicitation of General Washington.

In January, 1778, Washington urged the measure upon Congress, (see his letter, printed in a foot note, 4 Journals, 211,) and Congress granted half-pay for seven years by resolution of May 15, 1778, (2 Journals, 554,) limiting the grant to "military officers commissioned by Congress." The surgeons, I believe, were not commissioned by Congress. This grant was continued by resolution of October 3, 1780, reorganizing the line, using, however, the descriptive term of "officers," there being none other than military officers named in the resolution. This resolution of October 3d was passed, subject to the approval of the commander-in-chief. In a communication to Congress, dated October 11, 1780, (printed in a foot note, 4 Journals, 212,) Washington recommended, among other modifications of the

resolution of October 3, 1780, that the grant of half-pay should be extended for life. This was done by the resolution of October 21, 1780. It nowhere appears that it was the design of Congress, in the resolutions of October 3d and 21st, to embrace new classes of officers. This, however, was done by subsequent resolutions—to general officers, by resolution of November 28, 1780, (3 Journals, 551,) to medical officers, by resolution of January 17, 1781, (id., 569,) and to chaplains, by resolution of May 8, 1781, (id., 617.)

The resolution of January 17, 1781, extending the grant of half-pay to medical officers, is stated in the preamble to have been passed upon consideration of a letter from General Washington, dated November 5, 1780. A copy of that communication is filed in this case.

It there appears that the hospital surgeons chose to consider the resolution of October 21, 1780, as giving the regimental surgeons half-pay; and thereupon they claimed the same provision. General Washington doubted, and asked the directions of Congress, which were given in the resolution of January 17, 1781. This resolution ignores all claim under the resolution of October 21, 1781, and makes an original grant of half-pay to all medical officers, thus showing by legislative construction that the medical officers were not within that resolve. On the other hand, the resolution of November 28, 1780, providing for general officers, declares expressly that the resolve of October 21, 1780, was intended to include such officers, although these were not among the officers mentioned in the latter resolve.

Again, if surgeons were embraced by the resolve of October 21, 1780, so were surgeons' mates—for both stand in that resolve on precisely the same ground—but surgeons' mates were not allowed half-pay by the resolution of January 17, 1781, nor have they ever received it to this day. If the construction contended for be correct, and surgeons be decided to be within the resolve of October 21, 1780, the heirs of surgeons' mates had a valid claim under that resolution, which has never yet been recognized by the government.

Again, when Baird's representatives sued in this court for half-pay, this court gave judgment for half-pay, not under the resolve of October 21, 1780, which would have given half his own pay, or \$390 per annum, but half-pay under the resolve of January 17, 1780, which limited it to the rate of a captain, \$240 per annum.

The language of the act of 1828 itself gives a construction to the resolve of October 21, 1780. It provides for all the officers entitled to half-pay under that resolve, and gives them an annuity according to their "rank in the line," clearly implying that all the officers entitled to half-pay by the resolve of October 21, 1780, had "rank in the line," and so they had if surgeons be excluded; but surgeons had no rank either in the line or elsewhere.

As to the second point.

The intention of the act of 1828, in graduating the annuity according to ranks in the line, may be thus illustrated. An infantry lieutenant's pay, according to his rank in the line, was \$26 $\frac{2}{3}$ per month;

if he acted as adjutant he got \$13 more, or if as paymaster \$20 more ; and he had besides certain emoluments.—(See General Washington's letter of November 5, 1780, above referred to.) The act of 1828 intended to refer to the \$26 $\frac{2}{3}$ and make that the standard.

Now, a surgeon received a gross sum as compensation, but if this compensation had been subdivided into pay, rations, &c., &c., as was the case in the line, his pay would not have exceeded that of a captain of infantry, (see Washington's letter, and resolution of January 17, 1781,) and consequently this would have been by the act, as it has been made by the department, the measure of his pension. The reason assigned by General Washington against allowing surgeons half their own monthly pay as a retiring pension, apply with equal force against taking that pay as the basis of pension under the act of 1828. General Washington evidently means to say that the compensation of a surgeon as compared with that of infantry officers is not more than equal to a captain's compensation, though his *pay*, literally taken, is greater, and it is only on a strictly literal construction of the act of 1828 that the surgeon claims a higher allowance than the infantry, viz : that his *pay* as pay, and not his gross compensation, was greater.

This reasoning, moreover, brings the department's decision clearly within the ruling of the Supreme Court in 15 Peters, cited for petitioner, in regard to the limitation imposed by the proviso, because we thus show that in confining the petitioner to the pay of an infantry captain, we bring it "within the words as well as within the *reason* thereof."

The whole difficulty in this case arises from two errors of the department. *First*, in admitting a claim under the act of 1828, which was not embraced by it, and to which, consequently, the provisions of the act intended to regulate the amount of pension could not without strained construction, be made to apply ; and, *second*, in afterwards (though not till 1843) admitting that surgeons under another act, precisely similar in substance to the act of 1828, were entitled to more than had been allowed under the latter act.

As to the third point.

This involves the right of Thacher's representatives to receive a larger rate of pension than he received in his lifetime. This question has been so thoroughly discussed by Attorney General Cushing in his opinion in the case of the heirs of Keziah Dow, (8 Opinions Attorney General, 198,) and by Attorney General Black in his opinion in Deborah Grant's case of September 19, 1857, that I deem it necessary only to refer to these opinions.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

JAMES THACHER'S HEIRS *vs.* THE UNITED STATES.*Brief on reargument.*

The petition claims the difference between the pay of captain of infantry and that of artillery and cavalry, under a pension awarded to James Thacher under the act of the 15th of May, 1828.

Facts as understood by the solicitor.

1. James Thacher was appointed and served more than two years as a surgeon of regiments of infantry.

2. That under the act of May 15, 1828 he applied for a pension, and one was granted to him at the rate of compensation allowed to a captain of infantry, (\$480 per annum,) which he drew until after the passage of the act of the 7th of June, 1832. That his pension dated back to the 3d of March, 1826.

3. That Thacher relinquished all claim under all former acts of Congress, and applied for and obtained a pension under the act of 1832, which he continued to receive until the time of his death in 1837, and under this act of 1832 he drew the full pay of a captain of artillery, which increased his pension from \$480 to \$600 per annum.

4. That the petitioners are the children of the said James Thacher.

Legal propositions.

First. *The act of May 15, 1828, did not authorize the granting of a pension to Thacher at a greater rate of compensation than allowed, if he was entitled to any, being that of a captain of infantry.*

The material part of the act of 1828 (4 U. S. L., 269, § 1) is in these words:

“That each of the surviving officers of the army of the revolution in the *continental line*, who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive, out of any money in the treasury not otherwise appropriated, the amount of his full pay in *said line*, according to his *rank in the line*, to begin on the 3d of March, 1826, and to continue during his natural life: *Provided*, that, under this act no officer shall be entitled to receive a larger sum than the full pay of a captain in *said line*.”

The true meaning of this provision is the first question in this case. The statute limits the pension to the pay of a captain “in said line.” The claimant insists that there were different corps in the continental line receiving different rates of compensation. It is this fact which creates the embarrassment on this point; but is rather nominal than real, and grows out of the omission of a palpable duty on the part of the claimants in stating their case and in making proof.

1. The legislator intended to provide for the cases as they existed.

A colonel of cavalry would receive the full pay of a captain of cavalry; a colonel of infantry would receive the full pay of a captain of infantry; a surgeon of a regiment of cavalry would receive that of a captain in that corps, and a surgeon of a regiment of infantry would receive that of an infantry captain.

2. The embarrassment grows out, not of the law, or its difficulty of construction, but out of the fact that the claimants have not stated or proved to which corps their ancestor belonged. Had they stated and *proved* that he served as surgeon in a regiment of cavalry or artillery, it would then be manifest that he was entitled to the higher grade of pay. But the petition and evidence are silent upon that point. Not having averred that he belonged to either of those corps, or proved the fact, the case must be disposed of as if no such corps existed. He was not a member of any such corps while in commission and serving as a surgeon. They have not made out a case of such service, and therefore cannot claim anything depending such service.

3. The service performed was that of surgeon of infantry.

The case presented in the petition and proof establishes this proposition. It is conceded that the ancestor served in some corps, and such is the proof. There were three distinct corps, it is understood, each forming a part of the "continental line." If Thatcher had served in one of those entitled to the highest rate of compensation, and the petitioners claim upon that ground, it was their duty to avow and prove such higher service. Not having done so, the conclusion is irresistible that he did not serve in either of those corps, but served in the one entitled to lower grade of pay. The government cannot admit a higher grade of service than is claimed, and the claim, in this case, does not extend to the higher grades.

4. The court cannot, after the word "captain" in the proviso of the act of 1828, interpolate the words "of cavalry," or "of artillery," so as to make the proviso mean what it does not express.

The claimants ask the court to make, in effect, this change in the words of the law. They ask this to be done, when they do not aver that their ancestor did serve in either of those military arms. They ask the court to accomplish this by construction so as to give those of all these corps the same compensation. They ask, in effect, that the infantry captain, and all infantry officers above the grade of captain, may receive the compensation paid to a corps in which they never served. This cannot be done by mere construction.

The claimants should have proved to which corps their ancestor belonged, and then all difficulty would have vanished.

In *Wetmore vs. The United States* 10 Pet., 647, pp. 653, 655, the Supreme Court considered a case analogous to this. The court held, that the word "cavalry" could not be interpolated so as to increase compensation from infantry to cavalry pay. They said when the word "major" "is used without regimental designation, it implies major of infantry; this arm of defence having been made the main body of modern armies. We think military men must so understand it; because, in this as in all other cases, where distinct parts form the minor portion, the larger or main body is understood without

particular designation, and the minor requires it to ascertain with certainty what part is referred to as spoken of."

If I am not correct in supposing that the intention of the act of 1828 was to give each corps in the continental line its own compensation, then the ruling in Wetmore's case, as above cited, requires all of them to be reduced to the infantry standard. The effect upon the claimants would be the same. In no event can they claim beyond infantry pay.

If I am right in this, then there is no balance due to their ancestor for them to claim.

Second. The decision of the War Department in awarding the pension is conclusive upon the ancestor and those claiming under him, and this court cannot review it and confer a larger one.

The laws of Congress established a special tribunal to adjudicate upon pension applications. They also provided in what cases persons should be entitled to pensions. The parties claiming applied to that tribunal and presented their evidence. It considered and adjudicated the case, and that decision was executed. No appellate tribunal was established, although the President might, if he chose, overrule the action of the Secretary of War and cause his own to be carried into effect.

In the present case, the ancestor applied, presented his evidence, and the department passed upon it, and gave him a pension equal to the pay of a captain of infantry, which he accepted and received and continued to draw for several years. Whether the department decided right or not, this court has no means of knowing. It is not constituted a tribunal of review, and if it were, it has not the evidence before the department so as to be able to determine whether it decided right or not. It may, and probably did, appear, on that application, that Thacher was a surgeon of infantry, and if so the whole ground of controversy must disappear, because he received all he was entitled to under the act of 1828.

The department passed upon his whole case as he chose to present it, and a decision upon it as presented, when a pension was granted, ended the matter.

If Thacher was not satisfied with it, he should have secured the review of the President, or refused to receive the certificate of pension. Neither he nor his descendants can split up one entire demand into different parcels and prosecute them one at a time. It is true that the Pension Office has sometimes reversed its own decisions, and in others granted a new trial, and received further evidence; but this was never authorized by law, and has been fruitful in bad results. But if that office could do so, it does not follow that this court can either review the decision of the department, or Pension Office, or grant a new trial, and receive additional evidence, with the view of increasing the gratuity previously adjudicated upon. The utmost that can be claimed for this court is, to consider rejected cases. But where the original action was in favor of the claimant, and he accepted what was awarded, he cannot come here and ask to have that award increased upon the ground that the amount was less than the

party claimed, or less than he might have obtained had he fully stated and proved his whole case.

In this case, the claimants, in effect, ask this court to declare that the War Department ought to have given their ancestor a pension to the amount of the pay of a captain of artillery, when there is no evidence but what he decided right in giving him only the pay of a captain of infantry. This court cannot exercise any such authority; but if it could, it is not shown that any error was in fact committed by the Secretary of War.

The claimants rest their construction of the act of 1828 upon that said to have been given to that of 1832. They insist that Thacher surrendered his certificate of pension under the act of 1828, and that he received one under the act of 1832 for the amount of full pay to a captain of artillery.

What was done under the act of 1832 cannot prove that the action under the act of 1828 was erroneous. If the two acts are the same in legal effect, the action under the act of 1832 no more proves error in that under the act of 1828, than the action under the latter proves error under the former. The action under the act of 1828 may as well be taken as the standard of perfection as that under the act of 1832. The point to be established by the claimants is, that the action under the law of 1828 was wrong.

The error is equally as probable under the last as under the first law.

But in fact the two acts are, in many respects, quite different. The act of 1828 was exclusively applicable to those officers in the continental line who were entitled to half-pay under the resolution of 1780.

The act of 1832 *expressly excluded this class* and included soldiers, &c, as well as officers, who had served in the continental line, not provided for by the act of 1828, and also *State troops, volunteers, and militia*. The limitation of the amount of payment is in these words, (4 v. 530 :)

“The amount of his full pay in the said line, according to his rank, but not exceeding, in any case, the pay of a captain in said line.”

This provision is more explicit than that in the act of 1828, because it introduces the rank of the officer as an element of description and limitation. It clearly intended to give the cavalry, artillery, and infantry officers, each the pay of his respective rank, but not beyond that due to a captain in his corps.

The construction should have been that which was given to the act of 1828. If a different one was given, it was clearly erroneous. But we do not know that a different one was given in this case, because we do not know what was shown under the application made pursuant to the law of 1832. Thacher may have proved, on that application, that he was a surgeon of and served in a regiment of cavalry or artillery. If he did not, then the Pension Office gave an erroneous decision.

In allowing him to surrender his pension certificate under the act of 1828, and giving him one under the act of 1832, the office made a clear mistake. Those *entitled* to the benefit of the former act are clearly excluded. The words of the act are :

“That each of the surviving officers * * who shall have served in the continental or State troops, volunteers or militia, at one or more terms, a period of two years during the war of the revolution, and *who are not entitled to any benefit under the act for the relief of certain surviving officers and soldiers of the revolution passed the fifteenth of May, 1828, be authorized to receive,*” &c.

By this provision Thacher was expressly excluded, because he was provided for under that act, and had actually availed himself of the provision.

The second section, which authorizes the relinquishment of further claims to former pensions and annuities, does not enlarge the first section of the act. It reads as follows :

“That no person receiving any annuity or pension under any law of the United States providing for revolutionary officers and soldiers, shall be entitled to the benefits of this act unless he shall first relinquish his further claim to such pension ; and in all payments under this act the amount which may have been received under any other act as aforesaid since the date at which the payments under this act shall commence, shall first be deducted from such payment.”

Clearly this provision does not repeal that contained in the first section, which excludes the officers provided for in the act of 1828 from receiving anything under the act. Prior to 1832 there had been numerous pension acts, some providing for classes and others for individuals. This section applies to these acts

The pension act of March 18, 1818, (3 U. S. L., 410,) only gave officers \$20 per month. Various private acts, several hundred of which will be found in the 6th volume, (Private Laws,) give less amounts than that specified in the act of 1832. As a specimen, see one at page 23, passed in 1796, which provides for hundreds of invalid pensioners varying from one-fourth to full pay. The second section of the act of 1832 applies to these classes of cases and gives full pensions upon the surrender of old pensions. If the Pension Office applied this 2d section to the officers and men provided for by the act of 1828, it did so without authority of law. There was no object for including them under the 2d section of the act of 1832, because the amount of pension provided in the latter act and the period of its continuance were precisely the same as under the act of 1828. To surrender one certificate and receive another of the precise same description would be an idle ceremony.

It is plain upon the face of this second section that it relates to those who were, under some former law, receiving a smaller rate of pension, which it was intended to increase by it. It did not look to the correction of mistakes committed under any former law, but to placing all who were receiving pensions upon an equal footing with those who were about to receive under the first section of the act.

If it is true, as alleged by the claimants, that Thatcher surrendered his certificate under the act of 1828, and obtained one for a larger amount under that of 1832, a mistake was committed against the government, which, instead of being indebted for deficiencies of several years, is entitled to have the excess received after 1832 refunded. The fact that the government has suffered by a blunder of the Pension

Office, lays no just foundation for repeating that blunder in this court.

Third. If Thacher in his lifetime had a legal right to an increased pension, that right has not devolved upon his children.

The act of 1828 authorized each surviving officer who was entitled to half-pay under the resolution of the 21st of October, 1780, and each surviving non-commissioned officer, musician, and private who enlisted during the war, and served therein, so as to be entitled to the reward of \$80, to receive pensions during their lives, and it was declared by the act that it "shall inure wholly to the personal benefit of the officer or soldier entitled thereto under this act."

The 5th section of the act provides :

"That so much of said pay as accrued by the provisions of this act before the 3d of March, 1828, shall be paid to the officers and soldiers entitled to the same, as soon as may be, in the manner and under the provisions above mentioned ; and the pay which shall accrue after said day shall be paid semi-annually, in like manner, and under the same provisions."

Under these provisions the claimants insist that they are entitled to receive as his children whatever Thacher might have received for himself. This right is distinctly denied, and forms a prominent issue between the parties.

1. The subject matter is not a contract, but a gratuity, which the government was not bound to make, and hence its protection of it from creditors. The law might have been repealed at any time at the pleasure of Congress, or altered so as to exclude a portion of those receiving pensions, as was the case under the law of May 1, 1820, (3 U. S. L., 659,) which excluded from the pension roll those whom the Secretary of War deemed not indigent. The giving gratuities and their continuation depends exclusively upon the will of the giver. If A promises to give B a dollar a day, when there is no contract between them, A is not bound to continue his payments longer than he chooses. He may cease them at his pleasure. It is so with pensions. The legal right never extends beyond that which is actually paid over. It is a perversion of language to call a general pension law a contract, the advantages of which may pass by law to the legal representatives of the pensioner, unless so expressly provided by statute, and when provided that it shall pass in a particular manner, that law may be repealed. This case is one of simple gratuity not reduced to possession.

2. The act itself makes no provision authorizing any other person than the surviving officer or soldier to derive any benefit whatever from this act. By its very terms it is confined to him and him alone. If Congress had intended that children should take where the party provided for was dead, it would have so said. But there is not a word upon that subject in the act. If the law is a contract, then Congress could not control the fund so as to screen it from creditors. It would be left to go to the legal representatives, where it might be applied to pay funeral expenses and debts, if he owed any.

But the act stops short after providing for the life of the meritorious

cause, (the person who served in the war,) and makes no provision beyond, and doubtless this was the deliberate intention of the law makers.

It is not pretended that this particular act authorizes in terms the heirs or legal representatives to claim any balance due. But it assumes that the act creates a vested right, and therefore the *heirs* are entitled to it.

But if it creates a vested right, it does not go to the heirs, but to the succession, and if, after paying debts, there shall be a balance remaining with the executor or administrator, it is to be distributed according to the law of the decedent's domicil, giving the widow, where there is one, her share, and then to the children and their representatives, as the laws of the State may provide. If the claim now set up grows out of a vested legal right, the present claimants have no rights whatever. They are not the persons entitled.

But Congress itself, by the act of the 2d of March, 1829, (4 U. S. L., 350,) second section, has provided :

“That whenever any revolutionary pensioner shall die, the Secretary of War shall cause to be paid the arrears of pension due to the said pensioner at the time of his death ; and all payments under this act shall be made to the widow of the deceased pensioner, or to her attorney, or if he left no widow, or she be dead, to the children of the pensioner, or to their guardian, or his attorney, and if no child or children, then to the legal representatives of the deceased.”

1. If there was a vested right under a contract, Congress would not have been legislating upon the subject.

2. And if they had, they could not have changed the effect of the contract under the laws of the pensioner's domicil.

3. It is clear that by this section Congress intended to provide for the case of undrawn accruing pension up to the time of the pensioner's death, which was not provided for in the act of 1828.

4. That Congress believed it had the power, and exercised it, of providing for the disposition of the undrawn accruing pension, and that it made its own disposition of it, in a manner different from what the laws dispose of a vested contract right, by giving first to the widow, then to the children, and if neither, then to the legal representatives.

5. These special provisions would not have been made if Congress believed that there was a previous legal vested right giving direction to the whole.

6. Congress would not have been legislating for the fraction of a year, if, in the shape of a vested contract right, the same had been included and disposed of under the law of 1828. The law was passed for the very reason that the law of 1828 did not apply to or cover it.

7. This act of 1829 did not apply or cover anything except the pension which had been granted and had accrued between the last time of drawing and the death of the pensioner. The words “arrears of pension” only apply to a case where a pension has been established and has been in part drawn, but some part has been left undrawn. The words “*due to a pensioner at the time of his death*” refer to and

describe a gratuity accorded to a particular person, and which had a previous beginning, but terminated at his death.

8. No one can be a *pensioner* who has not been adjudged to be such under a law, and that adjudication reduced to productive form by inscription on a roll or by granting a certificate.

If Congress had designed to provide that whatever an officer might have received may be received by his widow or children after his death, they would have said so in intelligible language, instead of providing for payment of what accrued between the time of the last payment and the pensioner's death.

The claimants next invoke the act of June 19, 1840. (5 U. S. L., 385.) This act has the following title:

“An act making provision for the payment of *pensions* to the executors and administrators of deceased *pensioners*, in certain cases.”

Now such an act would not be needed if the act of 1828 was a *contract* and conferred a *vested right* in the person performing service, because the existing general laws of the States would have placed in the hands of his executors or administrators without the aid of a law of Congress.

But Congress, instead of treating these pensions as a *vested right*, assumed control of the subject, and made provisions wholly inconsistent with the idea of vested rights. If there had been vested rights they would have remained a part of the pensioner's estate, and would have gone first to pay his debts. But Congress said, in effect, these are not vested rights, and we will give the direction of our bounty, first to the worthy cause, and then to those dependent upon him, that is, to the widow, and if none, then to his executor or administrator for the benefit of his children, and no part shall go to pay his debts. The first section of the act of 1840, which is prospective only, provides:

“That in case any male *pensioner* shall die, leaving children, but no widow, the amount of *pension* due to such *pensioner* at the *time of his death*, shall be paid to the executor or administrator on the estate of such *pensioner* for the sole and exclusive benefit of the children, to be by him distributed among them in equal shares, and the same shall not be considered as a *part of the assets of said estate*, nor liable to be applied to the *payment of the debts* of said estate in any case whatever.”

This provision, like that of the act of 1829, relates exclusively to the amount of the unpaid pension evidenced by the usual certificate, and not to matters which might be made the foundation of a claim of a pension. If there had been no pension granted, then there could be none due.

If, on the soldier's death, the claim would pass to the legal representative as a part of the legal estate, no law was necessary to give it to the executors and administrators. Nor could Congress order them not to pay debts, but to give it to the children of the deceased.

The second section provides:

“That in case any *pensioner* who is a widow shall die, leaving children, the amount of *pension* due at the time of her death shall be paid to the executor or administrator for the benefit of her children, as directed in the foregoing section.”

The third section provides:

“That in the case of the death of any *pensioner*, whether male or female, leaving children, the amount of *pension* may be paid to any one or each of them, as they may prefer, without the intervention of an administrator.

Here, again, Congress interfered directly to declare what should be done with its bounty, which it could not have done, if the act of 1828 or that of 1832 created a vested right.

The great error, by whomsoever committed or approved, lies in the fact of treating pensions not actually granted and received, as vested legal rights. Congress has not so treated them, and by no rule of legal construction or analogy can they be considered such.

There is high authority for this position. Attorney General Cushing, in *Oo-la-ya-tah's* case, (7 Op., 619,) where this question was distinctly presented, held:

“Where the pension acts omit to make mention of representative persons, the latter are not entitled according to the tenor and true intendment of the acts.

“The revolutionary pension acts have been so long misconstrued in this respect, that it seems too late to return to their proper construction.

“But no such misconstruction of the invalid pension acts has obtained in practice, nor can it now be allowed.

“Cherokee Indians, entitled to invalid pensions by treaty, have no larger rights in this respect than officers and soldiers of the army.

“Hence, a pension claimable, but not claimed by a Cherokee in his lifetime, does not descend as arrears to his legal representatives.”

The above are his own head notes to an elaborate opinion, which demonstrates the correctness of the opinion that representatives do not take.

In *Lovering's* case, (7 Op., 717,) Mr. Cushing repeated these views. He held:

“Arrearages of pensions, claimed and adjudicated, belong to the representatives of the party on his decease, as a debt due from the government.”

“*Secus*, when the right to claim a pension exists, but the right has not been asserted by the party in his lifetime.

“An exception to this rule has been established in practice, by misconstruction of the statute in favor of the children of persons entitled by reason of service in the revolutionary war.

“While it may be inexpedient to disturb this practice now, it cannot be extended by further misconstruction beyond the case of children.”

This opinion was reiterated in the case of *Keziah Dow*, (8 Op., 198,) in which, at page 200, he says:

“There is also a class of enactments, which in express terms grant a pension to certain persons in the right of the officer or soldier who served, and these enactments are conclusive to the same point—that is, they negative the supposition that as a general doctrine of statute, it ever was intended that pensions *in posse* are a vested right, are the property of the pensioner *in posse*, and so pass of right to the repre-

sentative persons. It is impossible to find negations by implication stronger than these in any act of Congress."

Mr. Cushing's reasoning on this point cannot be overthrown. His only error is in yielding to the suggestion that past practice sanctifies a positive violation of law, and therefore, that such violation may continue. This doctrine cannot be sustained. If the law has been violated, and that is known, it is the duty of courts to say so, and put an end to it. What is clear law should never be violated upon the ground of past reputation. This doctrine would sanction crime, for the known violation of a law is crime. A judge sworn to administer the law cannot justify himself upon the assumption that other judges have done so. It is his duty to administer the law as he knows it to exist.

Attorney General Black met this question and decided it in Deborah Grant's case. He held that grandchildren were not entitled to come in and claim a pension that their grand parent might have claimed, but did not upon the express ground that the children were not entitled. He shows that the case of *Walton vs. Colton*, 19 How., 355, had no bearing upon the question, because there was no such point in the case.

In that case neither side disputed the right of the children to take. The one side had received the fund upon the claim of the children, and did not stultify itself by saying that it had illegally received it. The other side also claimed that not only the children, but grandchildren, were entitled. Instead of disputing the right of the children to receive, both were interested in sustaining that right, and hence neither questioned it. The court merely held, that what a child had received ought to be distributed to representative grandchildren. That case is no authority for the ground assumed by the present claimant.

It is a melancholy exhibition of recklessness to see claims pressed when the main ground upon which they are rested is not that the law as passed by Congress authorized it, but that misconstruction has prevailed too long to be corrected.

This misconstruction has drawn its millions from the treasury, and given it, not to the worthy objects intended to be benefited by Congress, but to those who have no claims upon the treasury superior to any other citizen.

Fourth. *Thacher was not an officer in the continental line, and therefore was not entitled to a pension under the act of 1828.*

The act of 1828 provided, not for all officers, but for those in the "continental line," according to their "rank in the line."

Surgeons and surgeons' mates were not in fact officers of the line, nor had they rank in the line, although they may have been in the continental service, and even may have been, under some resolution, entitled to half-pay for life.

The claimants do not show that their ancestor belonged to the *line*, but state facts which show that he could not have done so. They show that he was in the *staff*, and not the *line*.

It follows that he was erroneously placed upon the pension roll under the law of 1828. He was not, in truth, entitled to a pension

until the passage of the act of 1832, and then to such an amount as his position in the corps in which he served entitled him.

This part of the case is fully discussed in Mr. McPherson's brief on the reargument, and will not be further pursued.

R. H. GILLET,
Solicitor.

JUNE 17, 1858.

APPENDIX.

Opinion of the Attorney General on the rights of children and grandchildren of revolutionary soldiers to receive pensions.

ATTORNEY GENERAL'S OFFICE,
September 19, 1857.

SIR: I have received your letter on the application made by the grandchildren of Deborah Grant for the pension to which they allege she was entitled, and have examined the papers by which it was accompanied.

Mrs. Grant first began to receive a pension in 1839; it was increased in 1841, and in 1853 she applied for a still further increase, alleging that the services performed by her husband entitled her to a larger pension than either of the previous decisions of the office had given her. Pending this last appropriation, she died, leaving grandchildren, but no children living. The grandchildren now renew the application.

As to the increase applied for in 1853, but never allowed, that must be regarded as an unestablished claim to a pension. The mere application made in her lifetime does not make the right of her children any better than it would have been if she had never applied at all.

I take it for granted that her grandchildren have proofs sufficient to show that she, in her lifetime, was entitled to receive what they now claim as her representatives. Nor will I stop to discuss the question whether the grandchildren of a pensioner have or have not the same rights that children have. It is settled by the Supreme Court (19 How., 355,) that they stand on equal ground. What has been decided by that tribunal is not, and ought not to be, open to further dispute.

It is also very clear that pensions due to widows will descend to their children or grandchildren just in the same way that pensions coming to revolutionary soldiers themselves will descend to theirs.

These principles being thus settled, the case before me, and the question arising on it, may be put thus: A soldier of the revolution who might have got himself placed on the pension roll, and received from the government a pension during his natural life, has died without doing so; can his children, after his death, get all that he might have got in his lifetime on the production of the same proofs?

Before this question can be answered in the affirmative, the right of the children must be shown by some act of Congress, which gives

it to them, either expressly or by very clear implication. The non-existence of a law to forbid it proves nothing. Every claim upon the public money must be made out affirmatively by the claimant. The burden of proving that such a demand is *not* well founded, never lies upon the government. No man can be allowed to take from the treasury what Congress has not given; and Congress gives nothing except when the intention to do so is expressed in plain and unambiguous words.

It is utterly in vain to argue that the annuity which the law authorizes a soldier to receive is property, in which he has a vested right, and descendible like money secured to him by a bond. It is not so. If it were, Congress would have no power to say whom it should go to after the death of the pensioner, for Congress cannot regulate the descent or distribution of property in the States. It would necessarily pass by the law of succession which prevails at the place of the pensioner's domicil. But it is a mere gratuity, which the government may and does bestow on whom it pleases. If it be not extended beyond the immediate object of the bounty, his representatives can have no interest in it. If it be so extended, the representatives take it as a favor, and not a right. It is for this reason alone that Congress, without regard to the law of the State, has always exercised the power of saying to whom the arrearages of a pension shall be paid when the pensioner dies. It is given to a widow in exclusion of children, and in other cases to children in exclusion of collateral kindred and creditors. This right of bestowing it on some classes of relatives, while others, equally entitled in justice and preferred by the general rules of law, are forbidden to enjoy it, springs entirely out of the right to withhold it from all of them. It follows, that if the children of a revolutionary soldier can get the pension due to their ancestor, they must get it pursuance of some positive law to that effect. Nothing remains, therefore, but to see whether Congress has made any provision which authorizes the children of a deceased soldier to prove the services of their parent, and get the pension which might have been awarded to him.

The second and third sections of the act of 1836 (5 U. S. L., 128) were manifestly and plainly intended to give certain representatives of deceased soldiers the privilege of establishing claims never established by the soldiers themselves. But the second section does not cover this case, because it refers only to those soldiers who died between the fourth of March, 1831, and the seventh of June, 1832. The third section is equally inapplicable; for it was intended solely to substitute the widow of a soldier as a pensioner in his place, upon proof by her of his services. Children are not spoken of.

The act of 1832, (4 U. S. L., 530,) in the fourth section, provides for the case of a pensioner dying between the semi-annual pay days, and directs that the proportionate amount accruing between the last pay day and the time of his death shall be paid to his widow, or, if he left no widow, to his children. This refers so clearly to a pensioner actually put on the roll in his lifetime, that nobody pretends to claim anything under it for the children of a soldier who died without being a pensioner. If there were no other law on the subject, I should have

my doubts whether the children of a pensioner could recover for what accrued further back than from the last pay day before his death, though one or several full payments might be due.

But the act of 1829, section 1, (4 U. S. L., 350,) declares that "whenever *any* revolutionary pensioner shall die the *arrears* of pension *due* to the said pensioner at the time of his death," shall be paid to his widow, or, if he left no widow, to his children. There is one consideration which sets aside all pretence of claim under this law in a case like the present. It provides only for the payment of *arrears*. This word has a signification as definite and well known as any other in the language. It means a balance—one portion left behind another portion—a sum still remaining unpaid, after payment of a part. Unless a pensioner received a part of his pension during his life, (and he could not do that without being on the pension roll,) there can be no such thing as *arrears* at his death. There are other reasons equally potent in favor of the same construction; but they will be embraced in what I have to say about the act of 1840.

That act (5 U. S. L., 385,) provides for the case of a *pensioner* who dies leaving a widow, and for the case of a *pensioner* who is a widow, but dies leaving children; and in both cases it says that "*the amount of the pension due to such pensioner at the time of his (or her) death*" shall be paid for the sole use of the children. It is incomprehensible how this law ever came to be understood as it has been by some of the officers of the pension bureau. There is not a word in it which could properly have been used to express the intention that children shall have the privilege of establishing a claim which their parent never made good.

For whose children does the act provide? For the children of pensioners. And who is a pensioner? One who receives a pension. It certainly does not include any but those who actually enjoy the bounty of the government in the shape of periodical payments. To say that a person is a pensioner for the reason that he might have become one by an act of his own, would be as gross a violation of the *jus et norma loquendi* as to call a man a soldier merely because he might have enlisted in the army if he had thought proper to do so.

But again: what is it that the act of 1840 gives to the children? Not the sum which their father or mother might have claimed and got, but the amount of *pension due* at the pensioner's death. An amount *due* is a sum presently payable, and implies that a time of payment has been fixed and fully expired. *The amount of pension due* means nothing unless it means the amount of a gratuity payable at certain periods, but still remaining unpaid, although the time or times designated for its payment have gone by. There never was a revolutionary soldier who would have called himself *pensioner*, or demanded anything as *due* upon a pension before it was allowed and established, and a time fixed for paying it.

This is not all. The law of 1836 shows that Congress knew very well how to describe a revolutionary soldier who died without getting a pension. In that act they do not speak of him as a *pensioner*, nor call the claim of his widow or children a *pension due*; but "*any officer, non-commissioned officer, musician, soldier, &c., whose services in the*

revolutionary war were such as specified in this act of 1832," and who died within a certain time—to his widow or children shall be given the amount of pension *which would have accrued, &c.* In the fourth section, the soldier is described as "any person *who served in the war of the revolution in the manner specified in the act of 1832,*" and to his widow is granted "the annuity or pension *which might have been allowed to her husband.*" I have quoted this law for the purpose of showing that when Congress chose to provide for the widow or children of a soldier who had no pension in his lifetime, they did so in words far different from those employed in the act of 1840.

I have now referred to and examined all the acts of Congress upon the subject, and I am brought to the conclusion that none of them will enable the children or grandchildren of a revolutionary soldier to sustain a claim against the government based on the mere fact that their ancestor performed services for which a pension might have been allowed him.

But the Supreme Court is thought by some to have decided the contrary in *Walton vs. Colton*, (19 Howard, 355.) I do not so understand that case. There was no such point in it. Nothing like the question I have been considering was raised, or discussed, or adjudicated. The Pension Office had permitted the administrator of a soldier's widow to apply for and recover a pension which had never been allowed to his decedent, and the only dispute was, whether the living children should keep it all, or whether the distribution should be among the children and grandchildren *per stirpes*. They decided in favor of the grandchildren's right to share it. The money in controversy had already been paid by the government, and both sides admitted it to have been rightly paid. There was no dispute except about the division. In such case the court could not get behind the issue made by the parties themselves. If the government had been legally there objecting to the right, I do not doubt that the decision would have been against both.

But the practice of allowing these claims has prevailed in the Pension Office for twenty-five years. It was supposed to be sanctioned by the high authority of Mr. Wirt, and certainly had the approval of Mr. Poinsett. It was doubted, however, by Mr. Woodbury, denied by Mr. Butler, and denounced as illegal by Mr. Cushing. Still it has maintained its ground in the office down to the present day.

Shall this practice continue? That is a question of mere administrative discretion, which you must answer. I think I have shown that it is not supported by any law, and under our system of government to pay out public money without law is to pay it against law.

I am, respectfully, yours, &c.,

J. S. BLACK.

Hon. J. THOMPSON,
Secretary of the Interior.

DR. THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.*Brief for petitioners.*

The solicitor having indulged me to read his brief in the *case* of Dr. Thacher, which I had the honor to submit for your consideration, beg to make a few remarks in reply.

There are two questions made:

1st. Whether captains of engineers, artillery, or cavalry, were captains in "said line," within the meaning of the proviso;

And 2d. If they were, does their pay constitute the limit imposed by the proviso, or is that limit the pay of infantry?

The first question I answer in the affirmative. The second in the negative.

First. Because the continental army was composed of corps or battalions of infantry, artillery, and cavalry, therefore, captains of distinct corps which together formed a main army, under a commander-in-chief.

Second. Because, the pay fixed by the continental Congress, the settlement made for commutation pay at the end of the war, pensions granted under the several acts and by special act of Congress, established the fact, that the officers of the corps of engineers, artillery, and cavalry, is *not limited to the pay of infantry*, but settled, allowed, and pensioned at the rates established by the resolve of May 27, 1778, which "established the pay and corps of the American army."

A question of doubt was entertained after the passage of the resolve of October 21, 1780, whether surgeons were embraced; to remove all apprehension, Congress, on the 17th January, 1781, further resolved, extending half-pay of captains to surgeons, and the commutation was computed at the rate of an infantry captain.

James Thacher was a regimental surgeon attached to the corps of infantry, and by reference to the resolve of May 27, 1778, it will be perceived that the pay of a captain of infantry was \$40 a month. That a surgeon of infantry was \$60 a month, till in the administration of the act of 1828, a surgeon who received sixty or seventy-five dollars per month, was limited to the stipend of an infantry captain.

Not so in the administration of the act of June 7, 1832, supplementary to the "Act for the relief of certain surviving officers who shall have served in the continental line or State troops, volunteers or militia, shall receive the amount of his full pay in the said line, according to his rank, not exceeding in any case the pay of a captain in the said line."

The execution of the act of 1832 was with the War Department. Secretary Cass laid down the rule, that pensions should be computed according to the monthly pay received by an officer in the corps to which he belonged, and if not attached to any particular corps, then according to the amount of his monthly pay, not exceeding the pay of a captain of ———.

Dr. Thacher was pensioned under the act of 1828, at \$40, the pay of infantry, and was permitted to relinquish for the act of 1832, at \$50,

the pay of captain of artillery, which he received to the time of his death in 1837.

But not only was Dr. Thacher pensioned as surgeon at the rate of \$50 per month, under the act of 1832, but also other surgeons and officers of the line, or of the line and staff where their pay was \$40 per month, and the same is extended to widows of officers whether of the continental line or State troops, volunteers, or militia.

All that is asked for in the case of Dr. Thacher is, that the same rule of practice be extended to him under the act of May 15, 1828, as he received under act May 7, 1832. The pension for five years under the same law, equal to the pay of artillery in lieu of infantry.

I do not see how the reason of the solicitor deduced from the decision found in 10 Peters, 647, *Wetmore vs. The United States*, has any bearing on the action of the department in executing the act of 1828.

It is allowed the decision of the Supreme Court in the case cited was in conformity to usage, because *Wetmore* was not attached to any particular corps of the army; the decision placed him very properly in the infantry, being the corps that composed the main body of the army.

If on the other hand he had been appointed a major of cavalry, the Treasury Department would have found no difficulty in adjusting his account as a cavalry officer.

ALEX. RAY, *Attorney in fact.*

BETSEY H. HODGE AND SUSAN T. BARTLETT, children and only heirs of
JAMES THACHER, deceased, *vs.* THE UNITED STATES.

JUDGE BLACKFORD'S OPINION.

The petition states that James Thacher, the father of the claimants, having been a surgeon's mate in the army of the revolution, was appointed in November, 1778, a surgeon in the first Virginia State regiment, commanded by Colonel George Gibson; that, in 1779, he accepted the office of surgeon in the Massachusetts regiment, commanded by Colonel Henry Jackson; and that he retired from service on the first of January, 1783, having been a surgeon four years; that under the act of Congress of the 15th of May, 1828, said James' name was inscribed on the pension roll of the United States, at the rate of \$480 *per annum*; and that under the act of the 7th of June, 1832, he relinquished all future benefits under said act of 1828, and availed himself of the privileges of said act of 1832; that his name was again placed on the pension roll at the rate of \$600 *per annum*, from the 4th of March, 1831, and so continued until his death in 1843; that said James, under said act of 1828, was entitled to \$600 *per annum*, which was the pay of a captain in the line in the artillery or cavalry, and was less than the pay of a surgeon; that being so entitled he often demanded payment, but the same was refused; that surgeons in the revolution received sixty and seventy-five dollars per month; but as under the act of 1828 they could not have more than the pay of a captain in the line, the claimants demand the difference between

\$480 *per annum* and \$600 *per annum* from the 3d of March, 1826, to the 4th of March, 1831, which difference amounts to \$600.

This case is submitted for our decision upon the allegations of the petition, admitting them to be true.

There are three questions involved in this case.

The first is, whether Doctor Thacher, as a surgeon, was within the description of officers mentioned in said act of 1828? But I shall not stop to inquire into that question, for though it be admitted that he was such officer, still, according to my view of the case, the claimants have no cause of action.

The second question is, whether, assuming the Doctor to be within the provisions of said act of 1828, he was entitled to a larger pension than forty dollars a month, which he received under that act?

That act, so far as it relates to this question, is as follows :

“That each of the surviving officers of the army of the revolution in the continental line, who was entitled to half-pay by the resolve of October twenty-first, seventeen hundred and eighty, be authorized to receive, out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, to begin on the third day of March, one thousand eight hundred and twenty-six, and to continue during his natural life: *Provided*, that under this act no officer shall be entitled to receive a larger sum than the full pay of a captain in said line.”—(4 Stat. at Large, 269.)

That act (considering the Doctor within it) gave him the full pay of a captain in the continental line. The pay of a captain in the artillery or cavalry in the revolutionary army was fifty dollars a month, but in the infantry it was only forty dollars a month.—(2 Jour. Old Cong., 567–8.) Now, if in the revolutionary army there were surgeons belonging to the artillery, and other surgeons belonging to the cavalry, and others to the infantry, it would seem to be proper to say that Thacher's pay would be that of a captain in the corps to which he belonged. And the resolve of Congress of the 27th of May, 1778, shows that there were surgeons attached to battalions of infantry; others to those of artillery, and others to those of cavalry.—(2 Jour. Old Cong., 567.) As the petition does not inform us to which of these parts of the army Thacher belonged, we must consider him as having been attached to that part which would entitle him to the least pay, and that was the infantry. The reason is that proof of his belonging to the infantry would satisfy the allegation in the petition that he belonged to a regiment, and a party is not required to prove more than his pleading alleges. Considering Thacher, therefore, to have been in the infantry, it may be safely said that he was only entitled to the pay of a captain in the infantry. If, however, Thacher, as a staff officer, cannot be said to have belonged to any particular part of the army, then the statutory provision aforesaid, that he should have the pay of a captain in the continental line means, in my opinion, that his pay should be that of a captain in the infantry, because the infantry constitutes the main body of the army. This was the rule at the Treasury Department, whilst pension claims were settled there, as appears by the following letter :

“TREASURY DEPARTMENT, *October 22, 1834.*

“SIR: In answer to the inquiry contained in Mr. Edwards’ letter of the 17th instant, I have the honor to inform you that, by the resolves of the old Congress, surgeons were promised ‘the half-pay of a captain,’ and that in the settlement made with them under those resolves, at the close of the war, their half-pay was reckoned at the half-pay of a captain of infantry, and the certificates which were issued to them under the resolves granting commutation in lieu of half-pay, were for five years’ full pay as captains of infantry.

“In determining the amount to be allowed to surgeons claiming the benefits of the act of the 15th of May, 1828, the department was guided by the construction which was found to have been practically given, and they were accordingly allowed the full pay of captains of infantry.

“LEVI WOODBURY.

“Hon. LEWIS CASS.”

(Mayo and Moulton, 550.)

In December, 1834, Mr. Butler, Attorney General, speaking of said acts of 1828 and 1832, says: “The general allusion to the pay of a captain in the line, when applied to the case of staff officers, must be understood as referring to captains in that corps which constitutes the main body of the military force. In our army this has heretofore been, and still is, the infantry.”—(Id., 420.)

Afterwards, in 1844, (the War Department having jurisdiction,) the Commissioner of Pensions concludes an opinion on the subject as follows: “The War Department, in fixing upon some rate of compensation in settling the commutation claims of surgeons, rated them as captains of infantry. As such they were paid; and if the acts of the old Congress, which are referred to in the act of 1828, are to be considered any guide in settling claims under the law of 1828, then they cannot be paid more than what an infantry captain receives.”—(Id., 549.)

In the case now before us, Thacher received from the department, under said act of 1828, the pay of a captain of infantry in the revolutionary army, which, in my opinion, is all he was entitled to.

The third question is, whether the claimants, supposing their father to have been entitled to the pension in question, but did not obtain its allowance, have a right to the money after his death.

If this question can be answered in the affirmative, it is because such right is conferred by some act of Congress. Pensions for past services like those of the claimants’ father, are mere gratuities, and it is the acts alone making the gift on which the claimants must rely.

The act of May 15, 1828, under which Thacher himself claimed, is silent as to representatives. Whatever right that act gives, is given to the officer alone. The act does not even provide for the payment to any person of a pension, or the balance of a pension, remaining undrawn by the pensioner at the time of his death.—(4 Stat. L., 269.)

The next is the act of March 3, 1829. The second section of that act supplies an omission in the act of 1828, and provides for the payment of the arrears of pension, due to the pensioner at the time of his death, to the widow, or, if no widow, to the children, or, if no children, to the legal representatives.—(4 Stat. L., 350.)

If the present were a claim for arrears of pension, left undrawn by a pensioner at the time of his death, and who left no widow, the act would be applicable. But this is a different case. Thacher was not a pensioner as to the money now claimed. The act of 1828, under which he claimed, was not an absolute grant of pensions. An officer within that act had a right to a certain pension, provided he satisfied the Secretary of the Treasury that his claim was valid, and obtained an adjudication by the Secretary in favor of the claim. But until such adjudication the officer was not a pensioner, and had no right to draw a pension from the treasury. Claims for pensions under general acts like that of 1828, differ entirely from claims under private acts granting pensions. When an act directs the Secretary to place a person by name on the pension list, at a specified rate, that is an absolute grant of the pension to the person named, and if he should die after such grant, leaving the pension or any part of it undrawn, the provision in the act of 1829, as to those who came after him, would apply. But as before said, the grant by the act of 1828 was conditional, and until the officer embraced by the act performed the condition, he could not be called a pensioner, nor would he leave in the treasury at his death any arrears of pension. There would be no pension there that he could have drawn himself, and of course he would leave none to be drawn by others.

The appropriation act of 1828 has this provision: "For the pensions to the revolutionary pensioners of the United States, two hundred thousand dollars."—(4 Stat. L., 312.) Now, was Thacher, as to said sum of \$120 a year, one of those pensioners? He was not, for the reason that he had not complied with the condition contained in the act of 1828, under which he claimed. It would not, perhaps, be strictly proper to say that the only evidence of a person's being a pensioner is the pension list; but it is safe to say that without an adjudication in his favor as aforesaid, a person is not a pensioner, nor can he, at his death, leave arrears of pension descendible under the act of 1829.—(4 Stat. L., 350.)

The next act is that of June 7, 1832. That act provides that "in case of the death of any person embraced by the provisions of this act, or of the act to which it is supplementary, (said act of 1828,) during the period intervening between the semi-annual payments directed to be made by said acts, the proportionate amount of pay which shall accrue between the last preceding semi-annual payment and the death of such person, shall be paid to his widow; or, if he leave no widow, to his children."—(4 Stat. L., 529.) The semi-annual payments thus directed to be made are evidently the payments of an allowed pension; and the proportionate amount spoken of in the act, to be paid on the death of a person embraced by it, is the balance of the pension at that time due to him.

The next is the act of July 4, 1836. The second and third sections

relate to persons who had served in the revolutionary war, but they have no application to the present case. The first section only applies to persons who died between the 4th of March, 1831, and the 7th of June, 1832; and the third section makes no mention of children. (5 Stat. L., 127.)

I now come to the act of June 19, 1840, which is the act, with said act of 1828, upon which the claimants principally rely. That act of 1840 is as follows:

“That in case any male pensioner shall die leaving children, but no widow, the amount of pension due to such pensioner at the time of his death, shall be paid to the executor or administrator on the estate of such pensioner, for the sole and exclusive benefit of the children,” &c.

“SECTION 2. That in case any pensioner who is a widow, shall die, leaving children, the amount of pension due at the time of her death shall be paid to the executor or administrator for the benefit of her children, as directed in the foregoing section.

“SECTION 3. That in case of the death of any pensioner, whether male or female, leaving children, the amount of pension may be paid to any one or each of them, as they may prefer, without the intervention of an administrator.”—(5 Stat. at L. 385.)

This act applies exclusively to pensioners; that is, to persons who, under some act of Congress, have been allowed pensions by an adjudication of the proper department; or to whom, by name, pensions have been directly and absolutely granted by private acts of Congress. The remarks which have been made in a previous part of this opinion in relation to the act of 1829, are applicable to this part of the case. As Thacher died without having obtained in his favor an adjudication of his claim to a pension in respect to said \$120 *per annum*, by the proper officer, that sum was not due to him from the treasury as a pension at the time of his death; and the claim, therefore, is not within said act of 1840.

All of the acts of Congress cited by the claimants have now been noticed, none of which appears to support their claim.

It must be observed further, with regard to said acts of 1829 and 1832, that nothing could pass under them to the claimants if their father left a widow. And we are now bound to presume that he did leave a widow, as the contrary is not alleged in the petition. So that, at all events, as to any claim under those acts, the petition shows no cause of action.

It appears that the practice of allowing these claims to children has prevailed in the department between twenty and thirty years; and an opinion of Attorney General Wirt, in 1825, in a navy pension case, is supposed to have occasioned the practice.—(2 Att. Gen., 1.) The practice has been approved by some heads of the departments, but the weight of authority is decidedly against it. In February, 1836, Attorney General Butler gave an opinion against the principle on which such claims were founded.—(3 Att. Gen., 36.) But he afterwards yielded to Mr. Wirt's opinion and the usage of the department. In March, 1839, the Secretary of the Treasury, Mr. Woodbury, wrote to the Commissioner of Pensions as follows:

"I had always supposed that the granting a pension was a personal matter, and when the claimant died the claim did not descend to his heirs or representatives, or if the certificate issued incautiously to a claimant after his death, that it was void. Any other view, I supposed, would lead thousands to apply for pensions for their fathers and grandfathers, who may have died after the law passed, and with claims to the pensions, but who never perfected their title and obtained the certificate while living. If the certificate issued while the claimant was living, then, of course, I suppose the heirs could receive any arrearages, and only then. If there has been an opinion of the Attorney General the other way, or any express legislation, then, of course, no doubt could be sustained in the case; but otherwise, I would thank you to lay this letter before the Secretary of War."—(Mayo and Moulton, 538.)

In March, 1850, Mr. Ewing, the Secretary of the Interior, wrote to the Commissioner of Pensions as follows:

"SIR: I herewith return the papers in the case of Mrs. Elizabeth Thom, widow of Nathaniel Thom, deceased, and I am of the opinion that the act of June 19, 1840, in its terms applies to *pensioners*, which means persons receiving pensions, not those who can make out a case entitling them to receive pensions, but who have not done it. They are not *pensioners*, though they may become so. This act regards the actual pensioner only, and provides for the payment of so much of his pension as may have accrued and remained unpaid at the time of his death." * * * * (Mayo and Moulton, 567.)

In August, 1850, Mr. Crittenden, Attorney General, gave the following opinion:

"It appears that Dr. John Knight was a pensioner for revolutionary services under the act of the 15th of May, 1828; that his pension was paid up to the 12th of March, 1838, when he died; that his widow, Polly Knight, under the act of July 7, 1838, applied for and obtained a pension in April, 1839, commencing at the time of his death, according to the practice of the Pension Office as it existed at the time; that pension was fully paid up to the time of her death, which happened before the passage of the resolution of the 16th of August, 1842, and before the expiration of the five years for which it was granted, computing from the death of her husband on the 12th of March, 1838. * * * * *

"Had Mrs. Knight been entitled to a pension, to commence from the 4th of March, 1836, yet having during her life acquiesced in the decision of the proper officer, giving it a different commencement, her representatives have no right, as it seems to me, to contest that matter after her death. The pension was intended as a personal bounty to her, and not as a gratuity to her representatives. All that passed to them on her death was a right to have the money which had accrued under her pension as it had been actually allowed, and which remained unpaid at the time of her death."—(5 Att. Gen., 248.)

In February, June, and November, 1856, Attorney General Cushing gave opinions, saying that the law properly construed was against such claims as the one before us, but that on account of the long prac-

tice of the department in favor of them, he did not advise a departure from it.—(7 Att. Gen., 619, 717, and 8 id., 198.)

In September, 1857, the present Attorney General, Mr. Black, gave an opinion that the practice of the Pension Office allowing such claims was not supported by any law, and his opinion has not only been approved by the present Secretary of the Interior, but the practice has been discontinued by the Secretary.—(Vol. 2, part 1, 1st sess. 35th Con., p. 66.) The claimants rely on a late decision of the Supreme Court of the United States, in the case of *Walton et al. vs. Cotton et al.*, 10 Howard, 355. But the question as to the legality of these claims was not raised in that case by the counsel, nor was it noticed or decided by the court.

It is the opinion of the Court that the facts set forth in the petition do not furnish any ground for relief. An order for testimony is not granted.

IN THE COURT OF CLAIMS.

REPRESENTATIVES OF JAMES THACHER *vs.* THE UNITED STATES.

LORING, Justice.

James Thacher was a regimental surgeon in the army in the war of the revolution, and survived the war. Under the act of 15th May, 1828, (4 Stat. at Large, 269,) he received \$480 per year, from the 3d March, 1826, to the 4th of March, 1831, a period of five years.

The petitioners allege that the said James Thacher was entitled to and demanded under said act the sum of \$600 per year, so that a balance of \$120 was left unpaid to him in each year of said period, and they now claim the amount of said balances.

I am of opinion that the said James Thacher was not within the provisions of the said act of 15th May, 1828, and that his representatives can claim nothing by force of it.

The first section of the act of 15th of May, 1828, is as follows :

“*Be it enacted, &c., That each of the surviving officers of the army of the revolution in the continental line who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, to begin on the 3d of March, 1826, and to continue during his natural life: Provided, That under this act no officer shall be entitled to receive a larger sum than the full pay of a captain in said line.*”

The words of the section are unambiguous, and they expressly confine recipients under it to those who were entitled to “half-pay by the resolution of October 21, 1780,” so that the question is brought to this, whether surgeons of regiments were entitled to half-pay under the resolve of October 21, 1780.

On the part of the petitioners it is claimed, that in the resolution of October 21, 1780, giving half-pay for life, the word “officers” includes

medical officers, and therefore surgeons. On the part of the United States it is claimed that the word "officers" in that resolve denotes only officers of the line of the army.

The resolve of October 21, 1780, had for its general object the arrangement of the line of the army. It first constitutes regiments, by declaring of what they shall consist, thus: "*Resolved*, That the several regiments of infantry requested from the respective States by a resolution of the 3d instant, be augmented, and consist of one colonel, one major, where the full colonels are continued, or one lieutenant colonel commandant, and two majors where full colonels are not continued; nine captains, twenty-two subalterns, one surgeon, one surgeon's mate, one sergeant major, one quartermaster sergeant, forty-five sergeants, one drum major, one fife major, ten drums, ten fifes, six hundred and twelve rank and file."

It then arranges the officers of companies; then provides for the augmentation of the regiments of artillery; then for four legionary corps, instead of four regiments of cavalry; then for two partisan corps; then for the enlistment of the whole of the troops for the period "of the war," and for the time they shall join their respective corps; then for officering the regiments of the southern department of the army; and then in immediate sequence of such arrangement of the line of the army, it provides as follows:

"That *the officers* who shall continue in the service to the end of the war, shall also be entitled to half-pay during life, from the time of their reduction."

The argument for the petitioners is, that the word "officers" in the clause last cited, and giving half-pay, includes surgeons, because surgeons are specified in the first clause of the resolution. But it is to be recollected that that specification is made only in the enumeration of the constituent parts of a regiment, and was as necessary for that purpose as the specification of fifes and drums.

And that the word "officers" in the clause giving half-pay was not used in reference to the enumeration in the first clause, declaring the constituent parts of a regiment, is shown by the fact, that although general officers are not mentioned in that first enumerating clause, they were yet included in the clause giving half-pay.

For, on the 28th November, 1780, (3 J. C., 551,) Congress thus resolved: "Some doubts having arisen in the minds of the general officers whether the resolution of the 21st October last, granting half-pay for life to the officers who shall remain in service to the end of the war was meant to extend to them,

"*Resolved*, That the said half-pay for life be extended to all major generals and brigadier generals who shall continue in service to the end of the war; that the resolution of the 21st October was so meant and intended."

This shows that it was not intended that the enumeration in the first clause of the resolution should construe the word "*officers*" in the clause giving half-pay, and thus excludes the petitioners' argument. And I think, as it was contended at the bar, that the resolution of October 21 is to be construed in connexion with other resolves with which it forms one legislative transaction, in fact, and in the history of the times.

This resolve of October 21, 1780, was one of a series of resolves passed by Congress in that year for the reduction and organization of the army ; and in making that reorganization, Congress arranged the several departments of the army separately, and each department in a distinct resolve. Thus, by the resolve of the 15th July, 1780, it arranged the quartermaster's department ; by the resolve of the 30th September, the medical and hospital department ; by the resolve of the 3d October, the regiments or line of the army ; and by the resolve of the 30th November, the commissary department. It would seem that in such a separate arrangement of the departments, each in a distinct resolve, the word officers in either of the resolves would refer to and denote "*officers*" in that particular department to which the resolve related : that is, that in the resolve arranging the medical and hospital department the word "*officers*" would mean medical and hospital officers, and in the resolve arranging the line of the army the word "*officers*" would mean officers in the line of the army.

Then, in this series of resolutions, the only provision for half pay is that of half-pay for seven years, and that is given only in the resolution of October 3, arranging the line of the army, and it is omitted in the other resolutions of the series arranging the other departments of the army. The inference would be, that half-pay was provided only for officers in that department arranged by the resolution of October 3, and was not provided for officers of those departments arranged by the other resolves ; and this would be the inference, because the letter of the resolutions, taken altogether, would so read.

But the resolutions of October 3 and 21 were both for arranging the line of the army, and the latter was only, as its history shows, an amendment of the former, substituting a provision of half-pay for life for the provision of half-pay for seven years ; and in such case the inference is that the substituted provision is to belong to the same class of officers as the original provision, and that therefore the purpose of the amendment was to enlarge the half-pay of that class of officers, and not to extend half-pay to other classes of officers, for whom no half-pay was provided in arranging the departments to which they belonged.

The history of the resolution of October 21, 1780, showing that it was in amendment of the resolution of October 3, is contained in the journals of Congress, by which it appears that the resolution of October 3 (and as far as appears no other of the series) was sent to General Washington by Congress requesting "*his opinion thereon.*" General Washington, in his reply, (dated October 11,) earnestly urged half-pay for life, and then said : " If the objection drawn from the principle of this measure being incompatible with the genius of our government, is thought insurmountable, I would propose a substitute, less eligible in my opinion, but which may answer the purpose. It is to make *the present half-pay for seven years* whole pay for the same period." The journals of Congress show that on the 21st October, 1780, Congress resumed the consideration of the report of the committee on General Washington's letter of the 11th, and carried out his recommendation of full pay for life by the resolution we are construing. It would seem clear that "*the present half-pay for life for seven years,*" referred

to by General Washington, was the half-pay specified in the resolve of October 3, arranging the line of the army, on which, and on which only, his opinion had been asked, and which he was then returning, with his comment on it, to Congress; and that it was instead of that half-pay for seven years, that Congress adopted the half-pay for life.

If the resolves of October 3 and 21 referred only to officers of the line, and provided half-pay only for them, then as the officers of the quartermaster's department and the commissary department were taken from the line and were thus within those resolutions, there was a wide difference in the matter of half-pay between the officers of the hospital and medical department and all other officers. While the half-pay was only for seven years after the war, there was some reason for this difference, because officers of the line were withdrawn by their military life from their civil avocations, and from practice and position in them, and to return to them and regain position in them at the end of the war would require some time, in which they would need means of support, and this, and no more, the half-pay for seven years would supply. But medical officers were not withdrawn from the practice of their civil professions by their duties in the army, but by these their experience and practice in their profession would be generally largely extended, and they would return to civil life better instructed and skilled than when they left it. And this may have been the reason for not extending the half-pay for seven years to them originally. But this reason would not account for the discrimination between medical officers and all others, when the resolve of October 21, 1780, changed the half-pay for seven years into half-pay for life, for such half-pay was not a temporary supply, but a permanent benefit, earned by service during the war, and the title to this belonged to medical officers as well as officers of the line. Thus, by the resolution of October 21, 1780, the difference between the medical officers and others as to half-pay became extended in degree and no longer justifiable by its former reason, and they complained of this difference, and Congress immediately passed the resolution of January 17, 1781, which, in its preamble, seems to me to declare that medical officers were not within the resolution of October 21, 1780, because it admits that the difference referred to exists; that it was not justifiable, and then proceeds to enact *a remedy* therefor.

It is observable that previous to the resolution of January 17, 1781, the only express provision for surgeons was by the resolution of September 30, 1780, for arranging the hospital department, already referred to, and that resolution gave them bounty lands and no more.

The resolution of January 17, 1781, in its preamble and enacting clause, is as follows: "Whereas by the plan for conducting the hospital department, passed in Congress the 30th day of September last, no proper establishment is provided for the officers of the medical staff after their dismissal from public service, which, considering the custom of other nations and the late provision for the officers of the army after the conclusion of the war, they appear to have a just claim to: for remedy whereof, and also for amending several parts of the above mentioned plan,"

"*Resolved*, That all officers in the hospital department and medical

staff hereafter mentioned, who shall continue in service to the end of the war, or be reduced before that time as supernumeraries, shall be entitled to and shall receive during his life, in lieu of half-pay, the following allowance, viz."

The resolution then proceeds to make the allowances to the several officers it mentions, and among them specifies surgeons of regiments, and gives to them an allowance "equal to the half-pay of a captain." This was not equal to half their own pay, and therefore to them was not half-pay, but "*in lieu of half-pay*," as the resolution describes it.

Now, the purpose of this resolve, as declared by the preamble, is to give officers of the medical staff "a proper establishment" "after their dismissal from the public service," which it says "they appear to have a just *claim to*." Could such language have been used, if such establishment had been already secured to them by the resolve of October 21, 1780, and in the fullest measure given to any?

Then the preamble contrasts the condition of medical officers with that of the officers of the army expressly in the point "*of the late provision*" made for the latter. Could this have been done if medical officers and officers of the army were equally included in that "*late provision*?"

The whole tenor of the preamble shows the purpose of improving the condition of the medical officers. For after referring to that condition, it says, "*for remedy whereof*." But the resolve of January 17, 1781, made the condition of surgeons worse than it was before, if they were included in the resolve of October 21, 1780; for under this latter resolve they would have been entitled to half their own pay, while the resolve of January 17, 1781, gave them much less, viz: only half a captain's pay.

The purpose of a preamble to a statute is to guide the construction of its enacting clause. The construction contended for by the petitioner makes the enacting clause reverse the general purpose declared by the preamble, and presents Congress as proclaiming a benefit to meritorious officers while it intends and inflicts an injury upon them. This seems to me the inevitable result of holding that the resolve of January 17, 1781, was a mere amendment of the resolve of October 21, 1780, and that this latter resolve included medical officers. Whereas the preamble and enacting clause of the resolve January 17, 1781, and the professions and acts of Congress are brought into harmony, not only with each other, but with the history of the times and of the transaction, if that resolve was enacted for the reason, that medical officers were not included in the resolve of October 21, 1780.

The history of the resolve of January 17, 1781, is shown in the Journals of Congress, (3 vol., p. 569,) which state thus, (January 17, 1781:) "Congress took into consideration the report of the committee on the letter of the 5th of November from General Washington," &c., &c. That letter was sent to Congress by General Washington with a memorial addressed to him by the officers of the hospital department, in which they complain that "the regimental officers are established on half-pay for life, while we are left without that provi-

sion ;” and they claim such provision. General Washington, in his letter of November 5th, transmitting this memorial to Congress, asks to know “how far the resolves of the 3d and 21st ultimo are to be construed in favor of the regimental surgeons who are to be reduced, the ascertaining of which previous to the arrangement is become interesting to them, and the subject of a variety of applications to me.” The letter of General Washington then proceeds to urge the claims of the memorialists, but advises that they should not be considered as entitled to half their own pay, but to an allowance of some less sum ; and it adduces the example of the British service, and says “that in that the surgeons of the hospital and regimental surgeons are upon reduction, entitled to half-pay ;” and he adds, “what the pay of the hospital surgeons in the British service is, I am not quite certain, but I believe it is equal to that of the captains.”

Thus General Washington declares his own doubts whether regimental surgeons were included in the resolve of October 21, 1780, and asks the instruction of Congress on that point, and Congress making the declarations in the preamble of the resolve of January 17, 1781, already commented on, frames that resolve in conformity to General Washington’s suggestions and gives surgeons the half-pay of captains only.

The preamble of the resolve of January 17, 1781, is the answer of Congress to the inquiry of Gen. Washington, whether regimental surgeons were included in the resolve of October 21, 1780, and it is a legislative construction of that resolve, made by its framers, within three months of its passage ; and I think its declarations are in substance, that no provision in the nature of half-pay after the war, had yet been made for medical officers, that they had a *just claim* to such provision, as was shown by the usages of other services, and by the *late provision* by the resolve of October 21, 1780, for officers of the line of the army ; and that to fulfil this just claim of the medical officers, and to remove the unjustifiable difference between them and other officers, (*in remedy whereof*) the resolve of 17 January, 1781, was passed. If this is so, surgeons were not within the resolve of October 21, 1780 ; and, therefore, were not within the act of May 15, 1828.

It is to be recollected that the question on the statute of 15th May, 1828, is not whether Congress intended to give or withhold from surgeons the full pay given to officers of the line ; but whether Congress intended to give such full pay to surgeons by that particular act. The words of the statute refer exclusively to the resolution of October 21, 1780, and can be extended to no other by construction.

The petition alleges that Dr. Thacher received \$450 per year under the act of May 15, 1828, and thus exhibits the opinion of the department that he was within the provisions of the act. For that opinion I have great respect, but I am not authorized to defer to it in the construction of a statute.

I am of opinion that evidence should not be ordered to be taken in this case.

IN THE COURT OF CLAIMS.

JAMES THACHER'S HEIRS *vs.* THE UNITED STATES.

SCARBURGH, J., dissented.

James Thacher was appointed a surgeon's mate in the army of the revolution as early as July, A. D. 1775, and was stationed at the hospital in Cambridge.

In March, A. D. 1776, he was appointed surgeon's mate to the regiment commanded by Colonel Asa Whitcomb.

In November, A. D. 1778, he was appointed surgeon of the first Virginia State regiment, commanded by Colonel George Gibson.

In 1779 he accepted the office of surgeon to the Massachusetts regiment, commanded by Colonel Henry Jackson, and retired from service on the 1st day of January, A. D. 1783.

He was in service seven years and six months, four years of which he was surgeon.

Under the act of Congress, approved May 15, A. D. 1828, (4 Stat. at L., p. 269, ch. 43,) the name of James Thacher was inscribed on the pension rolls of the United States at the rate of \$480 *per annum*.

Under the act of Congress, approved June 7, A. D. 1832, (4 Stat. at L., p. 529, ch. 126,) James Thacher relinquished all future benefits under the act of 1828, and availed himself of the privileges of the act of 1832, according to its provisions; and his name was again placed on the pension roll of the United States, at the rate of \$600 *per annum*, from the 4th of March, A. D. 1831, and so continued till his death, in the year 1843.

The petitioners claim that, under the act of May 15, A. D. 1828, James Thacher was entitled to \$600 *per annum*, that being the pay of a captain in the line, in the artillery, or cavalry, and less than the pay of a surgeon; and, being so entitled, he often demanded pay thereof, but it was refused by the executive department of the government charged with the pay of pensions. Payment of it has also been refused since his death.

The petitioners claim six hundred dollars for the balance of pension due their ancestor at the time of his death.

The first question which we are called upon to consider in this case is, were surgeons included by the act of 1828? In considering this question, we must necessarily inquire whether surgeons were embraced by the resolution of October 21, A. D. 1780; and in doing this, it is supposed to be necessary to determine, (1) whether surgeons were *officers commissioned* by Congress; and (2) whether they were *military officers*.

As the main question now to be settled is, whether the taking of testimony shall be ordered in this case, I shall for the present assume that surgeons were officers commissioned by Congress, and that there is a sufficient averment to that effect in the petition. The averment ought, perhaps, if material, to be expressly made in the petition; but that question does not now arise, and under our practice an amendment for that purpose would be allowed if desired. I proceed there-

fore at once to the consideration of the second point, whether regimental surgeons in the army of the revolution were *military* officers.

The word "military" in the resolution of May 15, A. D. 1778, is used in contradistinction to "civil" and "naval," and the phrase "military officers" is equivalent to "officers of the army." That resolution therefore is to be understood in the same sense as if it read "all officers of the army commissioned by Congress," instead of "all military officers commissioned by Congress." It is clear, from the whole correspondence of General Washington upon this subject, that the plan contemplated by him embraced at least all the commissioned officers of the army. I do not now say that it did or did not go further, for that is a point not involved in this case, and I have not considered it. It is equally clear, from the subsequent action of Congress, that the phrase "military officers" in that resolution was understood by them to be equivalent to the phrase "officers of the army." Moreover, the word "military" is not a technical term, and ordinarily embraces whatever pertains to the army and militia.

It cannot be justly deduced from any letter of General Washington, or from his whole correspondence taken together, that he designed to exclude any class of officers in the army from the provision of half-pay, which he so frequently and so urgently pressed upon Congress. It is certain that he nowhere expressly so declares. On the contrary, that his plan embraced at least all the commissioned officers of the army, is obvious from several considerations. (a) The language used by him naturally had this meaning. (b) No good reason has been or can be assigned why any should be excluded. (c) The reasons urged by General Washington in favor of his plan were applicable alike to all classes of officers. (d) The exclusion of any class would have defeated, as to that class at least, the great object of the plan, by causing the immediate resignation of the officers belonging to it, and their consequent loss to the army. (e) The very memorial from the officers of the hospital department, a copy of which is on file in this case, shows very clearly the state of feeling amongst the officers on this point. (f) General Washington had watched this feeling with too much care to have been deceived or in any way mistaken in regard to it. (g) He was fully aware of the danger of offending it, and with untiring energy guarded against every measure which could be justly charged with having such a tendency.

That Congress, in the resolution of May 15, A. D. 1778, used the phrase "military officers" as equivalent to the phrase "officers of the army," is demonstrated by the language of the resolution of August 24, A. D. 1780, extending the resolution of May 15, A. D. 1778, to the widows and orphans of those officers. That language is, "that the resolution of the 15th day of May, 1778, granting half-pay for seven years to the *officers of the army*," &c. It conclusively shows that Congress used "officers of the army" and "military officers," as convertible phrases.

The common law writers speak of the *military* state of England. Sir Wm. Blackstone says: "The military state includes the whole of the soldiery, or such persons as are peculiarly appointed amongst the rest of the people, for the safeguard and defence of the realm."—(1

Blk. Com., 408) James, in his Military Dictionary, thus defines "military:" "Something belonging to the soldiery or militia, &c." The ordinary lexicographers define the adjective "military," as follows: "1. Pertaining to soldiers; 2. Engaged in the service of soldiers or arms, as, a military man," &c.; and the noun "military:" "The whole body of soldiers; soldiery; militia; an army."

If regimental surgeons, then, were officers commissioned by Congress, they were officers of their respective regiments, and if regimental officers, they were officers of the army or military officers.

It is certain that Congress so considered them. On the 18th day of August, A. D. 1779, Congress proceeded to the consideration of the report for a further allowance to the *officers of the army*, when a motion to take up "the clause in the report for extending the half-pay to continue during life" was negatived. Immediately afterwards, the following resolution was adopted: "That until the further order of Congress, *the said officers* be entitled to receive monthly for their subsistence money, the sums following, to wit: each colonel and brigade chaplain, \$500; each lieutenant colonel, \$400; every major and regimental surgeon, \$300; every captain, \$200; every lieutenant, ensign, and surgeon's mate, \$100." This resolution contemplates a surgeon not only as an officer of the army—one of *said officers*—but moreover as one of the officers for whom provision had been made by the resolution of May 15, A. D. 1778; for the matter in relation to the said officers just disposed of and thereby referred to, was a proposition to extend the half-pay provided by that resolution "to continue during life." Even in the resolution of October 21, A. D. 1780, which was framed in accordance with the recommendation of General Washington, a surgeon is expressly named as one of the regimental officers.

It seems to me, therefore, to be clear that regimental surgeons in the army of the revolution were military officers, and being as I have for the present assumed, commissioned by Congress, they were within the resolution of May 15, A. D. 1778.

The resolutions of October 3 and October 21, A. D. 1780, were probably, in their scope, neither larger nor more restricted than the resolution of May 15, A. D. 1778. The resolution of October 3 never went into operation. It was submitted to the commander-in-chief, and afterwards amended, in pursuance of his suggestions, by the resolution of October 21. The last resolution provided half-pay for life for all officers who should be reduced by the reorganization of the army thereby required, and then further provided, as follows: "That the officers who shall continue in the service to the end of the war shall also be entitled to half-pay during life, to commence from the time of their reduction."

The natural construction of the resolution of October 21, taking it in connection with the letter of General Washington, of October 11, A. D. 1780, which may justly be regarded as its basis, would embrace, at least, all the commissioned officers of the army. General Washington said: "It is not the intention of these remarks to discourage a reform, but to show the necessity of guarding against the ill effects by an ample provision, both for the officers who stay and for those who are reduced." This was but a reiteration of what he had

often urgently pressed upon Congress, and plainly embraced all the officers of the army; and the resolution itself, upon its very face, shows that it was designed but to embody and carry out the recommendation of General Washington. It was, I think, so understood by Congress, and is so spoken of by all the historians who have noticed it. Baron Steuben, who was then in Philadelphia, wrote as follows: "It is with the greatest satisfaction I acquaint you that the plan of arrangement for the army which your excellency sent to Congress has been agreed to without any alteration. The granting half-pay for life to the reduced officers has met with some opposition, yet the proposition has not only passed, but it was resolved immediately after to extend these advantages to *all the officers* in the service."—(6 Wash. Life and Writings, by J. Sparks, 255.)

But as only regimental officers were specially named in the resolution of October 21, A. D. 1780, doubts arose in the minds of the general officers whether it extended to them. This occasioned the explanatory resolution of November 28, A. D. 1780.

From the same cause the officers of the hospital department supposed that they were not provided for by the resolution of October 21, and, therefore, they presented to the commander-in-chief the memorial which has already been noticed. There is nothing in the letter of General Washington to Congress, based upon this memorial, from which any opinion of his as to the construction of the previous resolutions can even be inferred. But it is indisputable that the resolution of January 17, A. D. 1781, was passed upon his suggestion and in conformity to his recommendations. That resolution, upon its face, is but an amendment of previous resolutions. It nowhere declares that no provision had been made for the officers therein named. It could not have done so, for such a provision had been made, but it differed in its details from the suggestions of the commander-in-chief. The resolution merely sets forth that, "by the *plan for conducting the hospital department*, passed in Congress the 30th day of September last, no *proper* establishment is provided for the medical staff," &c. It then goes on merely to modify the previous resolution, by declaring that, *in lieu of half-pay*, the officers therein named should be entitled to the provision thereby made for them. It was, in fact, but an amendment of the resolutions of October 21 and of September 30, A. D. 1780, and in legal contemplation a part of them. They together constitute one system, and must be construed as if they had been passed at the same time.

My opinion, therefore, is, that regimental surgeons in the army of the revolution were embraced by the resolution of October 21, A. D. 1780.

But it is suggested that surgeons were not officers of the army of the revolution in the continental *line*. James, in his Military Dictionary, says that the true import of *line*, in military matters, means that solid part of an army which is called the main body, and has a regular formation from right to left. But he also says, that this term is frequently used to distinguish the regular army of Great Britain from other establishments of a less military nature. It was doubtless used in both these senses in the proceedings of the old Congress. It was

sometimes used to designate the continental army in contradistinction to the militia, or from the merely State lines. It was again used to designate the main body of the army, which had a regular formation from right to left, in contradistinction to the staff, &c. A single illustration may be sufficient on this point. On the 20th day of November, A. D. 1779, Congress adopted a resolution "that the director general, * * * *regimental surgeons*, and mates, * * * shall each be entitled annually to draw clothing from the stores of the clothier-general in the same manner and under the same regulations as are established for officers of the *line* by a resolution of Congress of the 26th day of November, 1777." On the same day, the very next succeeding resolution provided "that until the further order of Congress the following officers of the military hospital shall be entitled to subsistence in like manner as is granted to officers of the *line* by a resolution of the 18th day of August last," &c. The "resolution of the 18th day of August last," which has already been quoted, expressly provides for *regimental surgeons*.

I have cited these instances, not as illustrations of the correct use of the word "line" in its different senses, but merely to show that it was used in different senses by the old Congress. In one of those senses, a regimental surgeon was an officer of the continental *line*, and in the other, he was not an officer of the *line*. When the phrase "continental line" was used (as it generally if not universally was) to designate the continental army, then a regimental surgeon was embraced by it, because he was an officer of the continental army. But when the word *line* was used in contradistinction to staff, then the regimental surgeon was not included, because he was a staff, and not a *line* officer in that sense. The words "continental line," in the act of May 15, A. D. 1828, were used in the former sense.

But it is also suggested that the act of 1828 applies only to officers who had *rank* in the continental line, and that regimental surgeons are not within it, because they had no *rank* in the line. In the sense here referred to, no officer in the continental army was entitled to pay "according to his rank in the line." The pay was regulated according to offices, and not according to rank—*i. e.* each officer was paid according to the office he held in the army. It is true that *rank* depended on *office*, but then an older officer of any particular *grade* takes *rank* of his junior officer of the same grade, whilst both receive the same *pay*. Regimental surgeons, being officers of the army, necessarily held office, though in strictness they may not have had *rank in the line*; and they received pay according to their office—*i. e.* the pay annexed by law to their office. No more was true of any other officer in the army. Each one was entitled to the pay annexed by law to his office, and this was his pay in the line—*i. e.* his pay in the army. Regimental surgeons, therefore, were entitled to pay according to their rank in the line, precisely in the same sense in which any other officers in the army were entitled to pay according to their rank in the line.

To my mind, therefore, it is clear, that if regimental surgeons in the army of the revolution were commissioned by Congress, they were within the act of 1828.

But if a regimental surgeon was within the act of 1828, to what was he entitled under that act? To his full pay in the continental army, reduced by the *proviso* of that act. The full pay of an infantry captain in the continental army was \$480 a year; and that of an artillery or cavalry captain was \$600 a year. To which of these was a surgeon entitled under the act of 1828? Did the act contemplate that any captain, whether of the infantry, artillery, or cavalry should receive a larger annuity than an officer of higher rank, whose full pay in the line was greater than his? Was it the intention of the act that a colonel of infantry, or of artillery, should receive only \$480 a year, and a captain of artillery \$600 a year? Nothing but express words, plainly susceptible of no other meaning, can justify a construction which would lead to such a result. But regimental surgeons are provided for precisely in the same way and by the same terms as every other officer whose pay exceeded that of a captain. If, therefore, a colonel of infantry was under the act of 1828 entitled to an annuity of \$600 a year, a regimental surgeon was also entitled to it. And such, it seems to me, was the clear intention of the act.

The case of *Wetmore vs. The United States* (10 Peters' R., 647,) is not analogous to this case. If the question now were, to what was a regimental surgeon entitled under the resolution of January 17, A. D. 1781, that case would have an important bearing upon it. Then it would be plain that the words of the resolution would be satisfied by giving to the surgeon the half-pay of a captain of infantry, and the principles of the case of *Wetmore vs. The United States* would seem to be entitled to a controlling influence. But in the question now before us, whilst it might be said that the words of the *proviso* would be satisfied by the pay of a captain of infantry, still such a construction would produce results in plain conflict with the spirit of the act. Moreover in the case of *Wetmore vs. The United States*, the *grant* was the pay of a major, whilst here the *grant* is the full pay of a surgeon, reduced by a *proviso* so as not to *exceed* the pay of a captain. Hence, it seems to me that the case of the *United States vs. Dickson* (15 Peters' R., 165) is directly in point. In that case the Court say: "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a *proviso* is afterwards introduced, that *proviso* is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a *proviso* carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the *words* as well as within the *reason* thereof." The effect of the application of this principle in that case was to allow a receiver of public money to retain the whole yearly *maximum* of his commissions for the fraction of the year in which he resigned. Hence, I think the *proviso* in the act of 1828 should be construed to refer to the pay of a captain of artillery, for no other pay is within both the *letter* and the *reason* of the *proviso*. A different construction, as I have shown, would give a colonel of infantry a smaller annuity than a captain of artillery, and thus violate

the spirit of the act; but this construction conforms as well to its letter as its spirit.

But the decision giving to a surgeon only \$480 a year was a cotemporaneous construction of the act of 1828. By that same decision, however, all other officers whose pay exceeded that of a captain of artillery were given \$600 a year; and thus the decision was inconsistent with itself. It was, moreover, as to the surgeons, founded on a wrong reason, that under the resolution of January 17, A. D. 1781, they had always been held entitled only to the half-pay of a captain of infantry; for the act of 1828 gave surgeons, not double what they were entitled to under the resolution of January 17, A. D. 1781, but their full pay in the army reduced by the *proviso* so as not to exceed that of a captain. The inconsistency of this decision with itself and the error on which it was founded were subsequently discovered, and a different construction, giving surgeons \$600 a year, was adopted under the act of 1832. So that the first decision is not entitled to weight as a cotemporaneous construction of the act of 1828.

Dr. Thacher then, being in his lifetime entitled to an annuity of six hundred dollars a year under the act of May 15, A. D. 1828, from March 3, A. D. 1826, to March 4, A. D. 1831, a period of five years, and having received payment therefor at the rate of only \$480 a year, the question now arises whether his personal representatives are entitled to receive the balance still remaining due, to wit, \$600.

Dr. Thacher was alive when the act of 1828 passed, and survived the fourth day of March, A. D. 1831. He proved in the manner prescribed by the Secretary of the Treasury, his title to the benefits of the act, but in consequence of an erroneous decision of the secretary, received only four-fifths of what he was entitled to. His title to the remaining fifth which he did not receive, was as clear as his title to the four-fifths which he did receive.

The act it seems to me gave, to each officer who served in the manner prescribed by it, a *title* to its benefits. It authorized him to receive the pay thereby provided. It required certain money to be deducted "from what said officer would otherwise be *entitled* to." It directed the *pay* to be paid "to the officer or soldier *entitled* thereto." It required the officer or soldier *entitled* to furnish evidence of his *title*. The amount which accrued from the 3d day of March, A. D. 1826, to the 3d day of March, A. D. 1828, was made payable "as soon as may be," and that which accrued afterwards was made payable semi-annually. Such a *title* it seems to me is property capable of being transferred *inter vivos*, and transmitted to representatives by death. The terms employed are appropriate to this purpose, and were, I think, so understood by Congress. Hence an express provision was inserted, declaring that it should not be transferable, or liable to legal process—qualities which it would have possessed but for this provision.

The only provision of the statute from which it might be inferred that this interest is not transmissible by death, to personal representatives, is that which declares that it shall enure wholly to the personal benefit of the officer or soldier entitled to it. But this I regard as but an emphatic mode of declaring what had before been expressed—

that it should not be transferred to a purchaser, or subjected by legal process to the payment of his debts. It was to be his own in all other respects and for all other purposes.

I feel the more confidence in this construction, because it is the cotemporaneous construction put upon the act immediately after its passage, by the Secretary of the Treasury, whose duty it was to carry it into execution, *and* that which it continued to receive till the year 1857.

Whether the second section of the act of March 2, A. D. 1829, was applicable to this case, is a question which I do not deem it material to consider.

After the act of 1828, thus construed by the Executive Department of the government, had been in operation more than four years, the act of June 7, A. D. 1832, was passed. The latter act was "supplementary" to the former, extending its benefits to a much larger class of officers and soldiers, but as regards the question now under consideration, its language was identical with that of the act of 1828. The act of 1832 thus adopted language which had already received a practical construction by that department of the government to which its execution had been committed. The legal presumption is, not only that this was known to Congress, but that in again using language the meaning of which in a previous statute had been ascertained, their intention was to use it in that sense. (Bac. Ab., 379.) I regard this as a legislative approval of the construction which had been adopted. The Secretary of the Treasury, accordingly, put the same construction on this act which he had previously put upon the act of 1828; and this construction though occasionally questioned, continued uninterruptedly to govern the practice of the Executive Department of the government under it till the year 1857, when the present Attorney General gave an opinion that it is erroneous.

My views, it seems to me, are still further strengthened by the provisions of the 2d section of the act of July 4, A. D. 1836.—(5 Stat. at L., p. 527, ch. 362.) Under the act of June 7, A. D. 1832, the pension allowed by it commenced on the 4th day of March, A. D. 1831, but no person was entitled thereto who did not survive the passage of that act. But the second section of the act of July 4, A. D., 1836, provides that if any officer, soldier, &c., who had served as required by the act of June 7, A. D. 1832, had died between the 4th day of March, A. D. 1831, and the date of the latter act, the amount of pension which would have accrued from the 4th day of March, 1831, to the time of his death if he had survived the passage of that act, should be paid to his widow; or if he left no widow, to his children. To my mind it is clear that this act was passed under the influence of the then well understood construction which had been put on the act of 1832. There was the same reason for providing for the widow and children of the officer who survived the passage of the act, but died before asserting his claim, as there was for providing for the widow and children of the officer who survived the period from which the pay commenced, but did not survive the passage of the act. The act of July 4th, A. D. 1836, would doubtless have embraced both cases, if it had not been considered that the former was already provided for

by the act of 1832. Not only was this act a *quasi* legislative construction of the act of 1832, but it shows the impropriety and injustice of adopting and acting upon a particular construction of a statute until subsequent legislation is based upon it, or influenced by it, and *afterwards* declaring it to be erroneous. The act of 1828 had received a known construction, and its words were adopted in the act of 1832 because they had already received that construction; and the second section of the act of 1836 was passed because the act of 1832 had failed to provide for a case which came within the equity of the latter act so construed.

My opinion is that an order should be made, directing testimony to be taken in this case.

HENRY W. MORRIS.

JANUARY 18, 1859.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HENRY W. MORRIS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Statement of facts agreed upon in the case.
3. Brief of claimant's counsel.
4. United States Solicitor's brief.
5. Opinions of Judges Blackford and Scarburgh adverse to the claim.
6. Dissenting opinion of Judge Loring.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said Court, at Washington, this 17th day of January,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

HENRY W. MORRIS *vs.* THE UNITED STATES.

Henry W. Morris respectfully represents: That he is a captain in the navy of the United States; that he was promoted to his present rank on March 13, 1857, to fill a vacancy which had occurred in the active list on December 26, 1856, by the death of Captain Bladen Dulany; and that his commission as a captain bears date December 27, 1856, as is shown by the letter of the honorable Secretary of the Navy to him, dated March 21, 1857, which is hereunto appended;

and that he has received pay as a captain from the date of his commission to November 1, 1857, at the rate of \$2,800 a year, as prescribed by the act of February 28, 1855.

Your petitioner further represents: That under the act of 1835, which regulates the pay of officers of the navy, his pay from December 27, 1856, to November 1, 1857, is.....	\$2,960 97
That he has received.....	2,368 38

And that there is still due and unpaid.....	592 59
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all of which will more particularly appear by reference to an account herewith filed and prayed to be taken as a part of this petition.

Your petitioner further shows: That this balance is refused by the Navy Department, (as will appear by the letter of the Fourth Auditor to your petitioner, dated August 5, 1857, and herewith appended,) on the construction which has been given to the "act" approved February 28, 1855, entitled "An act to promote the efficiency of the navy." That act organized the late naval board, and authorized it to create a reserved list, and then provided: "That the vacancies created in the active list by placing officers on the reserved list shall be filled by regular promotion in the order of rank and seniority," and officers who may be promoted to fill the vacancies created by the reserved list shall, while so unemployed, receive only the leave of absence or waiting orders pay to which they would have been entitled if such promotion had not been made; but when employed at sea or other duty they should receive, in addition to such leave of absence or waiting orders pay, the difference between the "waiting orders" and "leave of absence pay" and the lowest sea-service pay of the grade to which they may be so promoted.

Your petitioner alleges that this act neither repealed or modified the act of 1835 in reference to the pay of officers, except as to the pay of those who were "promoted to fill the vacancies created by the reserved list. And he denies that he was so promoted, but, on the contrary, alleges that his promotion was long subsequent to the time when all the vacancies "created by the reserved list" were filled, and that his pay cannot be included within the provisions of the act of February 28, 1855, without a violation of the plainest rules for the construction of statutes.

Your petitioner further alleges that the adoption of the rule contended for at the Navy Department would decrease the aggregate pay of the navy, while the allowance of the pay contended for to himself and others standing in the same relation would not increase "the aggregate pay of said grades or of the naval service," as allowed by law at the time of the passage of said act of 1855.

Your petitioner alleges that he is the sole owner of said claim, having parted with no interest therein, and prays that a bill may be reported to Congress for the payment of the amount found due to him on the hearing of the case.

HENRY W. MORRIS.

P. PHILLIPS,
Solicitor for Claimant.

Pay received as a captain on duty, at the rate of \$2,800 per annum:

From December 27 to December 31, 1856, 5 days, is.....	\$28 76
From January 1 to March 31, 1857, 1st quarter, is.....	699 38
From April 1 to June 30, 1857, 2d quarter, is.....	697 48
From July 1 to September 30, 1857, 3d quarter, is.....	705 16
From October 1 to October 31, 1 month, is.....	237 60

Amount received.....	2,368 38
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Amount claimed as captain on duty, at the rate of \$3,500 per annum—

From the 20th December to 31st December, 1856, 5 days.....	\$47 94
From the 1st January to 31st March, 1857.....	863 01
From the 1st April to 30th June, 1857.....	872 60
From the 1st July to 30th September, 1857....	882 19
From the 1st October to 31st October, 1857....	297 26

2,963 00

Deduct hospital fund, at 20 cents per month....	2 03
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2,960 97

Difference to 1st November, 1857.....

592 59

HENRY W. MORRIS.

NAVY DEPARTMENT,
March 21, 1857.

SIR: The President of the United States, by and with the advice and consent of the Senate, having appointed you a captain in the navy, from the 28th of December, 1856, I have the pleasure to enclose herewith your commission, dated the 16th instant, the receipt of which you will acknowledge to the department.

I am, respectfully, your obedient servant,

I. TOUCEY.

Captain HENRY W. MORRIS,
United States Navy, New York.

TREASURY DEPARTMENT,
Fourth Auditor's Office, August 5, 1857.

SIR: I have received an answer from the Secretary of the Navy to the letter I addressed him in regard to your pay. The following is an extract: "It is the opinion of the department that Captain Morris is promoted to the rank of captain by the operation of the act of February 28, 1855, and is, therefore, entitled only to the modified pay prescribed by that act."

I am, sir, very respectfully, your obedient servant,

A. O. DAYTON.

Captain HENRY W. MORRIS,
United States Navy, New York.

Agreed statement of facts.

1. Captain Bladen Dulany was commissioned on the 8th September, 1841, and died on the 26th December, 1856.

2. The petitioner, Commander Henry W. Morris, was nominated to the Senate as captain, vice Bladen Dulany, deceased, and this nomination was confirmed on the 13th of March, 1857, to date from the 27th of December, 1856.

3. The amount claimed in the petition is due by the government if the petitioner is not included in the 2d section of the act of 28th February, 1855, entitled "an act to promote the efficiency of the navy."

4. On the 14th September, 1855, there were promoted to fill vacancies on the active list 34 captains, 73 commanders, and 157 lieutenants, 264 in all; of these 63 were promoted to fill pre-existing vacancies, and 20 to fill vacancies created by the retiring board.

5. The aggregate pay of the navy will not be increased by paying the petitioner, and those who stand in the same position, the full pay claimed, if those who were promoted to fill the vacancies occasioned by the retiring board are confined to the modified pay provided by the 2d section of the act of 28th of February, 1855.

6. The petitioner would not have been entitled to promotion on the death of Captain Dulany had not a senior commander, V. M. Randolph, been previously promoted to fill a vacancy in the rank of captain created by the retired list.

7. Had not Commander V. M. Randolph been previously promoted to fill a vacancy created by the retired list, he would have been entitled to promotion to the vacancy occasioned by Captain Dulany's death.

8. If the petitioner be paid the aggregate pay of the navy will be increased, unless full pay be denied to some captain who is senior to the petitioner.

9. The department pays full pay to the officers promoted to fill vacancies created, so far as it does not exceed the aggregate pay of the several grades or of the service.

JOHN D. McPHERSON,
Deputy Solicitor.
H. PHILLIPS,
Solicitor for Petitioner.

Brief of argument as to the construction of the second section of the act of 28th February, 1855, modifying the pay of certain officers of the navy. Court of Claims. Henry W. Morris vs. United States. By P. Phillips, solicitor for petitioner.

IN THE COURT OF CLAIMS.

HENRY W. MORRIS vs. UNITED STATES.

By the act of March 3, 1835, entitled "An act to regulate the pay of the navy of the United States," (4 Stat., p. 755,) it is provided,

that "from and after the passage of this act the annual pay of the officers of the navy of the United States shall be as follows :

"The senior captains, at all times when on service.....	\$4,500
"When on leave of absence or waiting orders.....	3,500
"All other captains, when in command of squadrons on foreign stations.....	4,000
"When on other duty.....	3,500
"When off duty.....	2,500"

By the third article of the agreed statement of facts, herewith filed, it is admitted, "that the amount claimed in the petition is due by the government, if the petitioner is not included in the second section of the act of February 28, 1855, entitled 'An act to promote the efficiency of the navy.'"

The first section of the act of 1855 created a naval board for the purpose of examining into "the efficiency of the officers."

The second section provided that "those officers found incapable of performing the duties of their respective ranks shall be dropped from the rolls or placed in the order of their rank upon the reserved list." That "those so placed on the reserved list shall receive the leave of absence or furlough pay to which they may be entitled when so placed according to the report of the board and the approval of the President, and shall be ineligible to further promotion." It then declares that "all vacancies created in the active service list, by placing officers on the reserved list, shall be filled by regular promotion in the order of rank or seniority. *And officers who may be promoted to fill the vacancies created by the reserved list*, shall, while unemployed, receive only the 'leave of absence' or 'waiting orders' pay, to which they would have been entitled if such promotion had not been made; but when employed at sea or on other duty, they shall receive in addition to such 'leave of absence' or 'waiting orders' pay, the difference between the 'leave of absence' or 'waiting orders' pay and the lowest sea service pay of the grade to which they may be so promoted."—(10 Statutes, page 617.)

The question presented is, whether Captain Morris is entitled to receive his pay under the provisions of the act of 1835, or whether he is to be included in the provision of the act of 1855, and so entitled only to the modified pay provided by the second section of that act.

The fourth section of the act of 1855 declares "that all laws or clauses of laws, *so far as they conflict* with the provisions of this act, are hereby repealed."

The act of 1835 is therefore in full force, and regulates the pay to which the petitioner is entitled, without such pay would be in conflict with the provisions of the act of 1855.

On the 14th September, 1855, there were promoted to fill vacancies on the active list 34 captains, 73 commanders, 157 lieutenants—in all 264. Of these, 63 were promoted to fill pre-existing vacancies, *and 201 to fill the vacancies created by the retiring board*.—(See 4th article of agreed statement.)

The vacancies created by the retiring board under the act of 1855 having been thus filled, on the 13th of March, 1857, the petitioner was

nominated to the Senate as captain, and confirmed, vice Bladen Dulany, who died on the 26th of December, 1856.

It is thus seen that Captain Morris' nomination took place eighteen months subsequently to the time when all the vacancies created by the naval retiring board had been filled, and was made in consequence of a vacancy created by the death of Captain Dulany, which also occurred subsequently to this period.

To maintain, therefore, that Captain Morris was promoted to fill a vacancy "created" by the naval board, it would be necessary to prove that Captain Dulany's death was caused by that board, and that having so caused his death, they had "created" the vacancy.

The board "created" the vacancies, and the law filled them. When thus filled, there never could be another vacancy "created" by the board, for the board itself had ceased to exist.

In the letter of the Fourth Auditor to the Solicitor of the Court, under date of January 12, 1858, herewith filed, he says: "The ground upon which Captain Morris was determined by the Secretary of the Navy to be entitled only to the modified compensation allowed by the act of February 28, 1855, is stated in the letter of the Secretary to this office of 5th August last. It is, that although he was not promoted immediately to a place vacated by an officer put upon the reserved list, he was nevertheless promoted '*by the operation of the act*' which prescribed the modified pay."

Now the words by the operation of this act thus marked in quotation, and thus italicised, *are nowhere to be found in the act!* Even if these words had been used, the construction would be that the proximate not the *remote* operation of the act was intended. "*In jure, non remota causâ, sed proxima, spectatur.*" The construction which extends the remote operation of the act to Captain Morris will include every promotion made in the navy subsequent to the action of the board.

But it is not necessary to discuss the effect and operation of terms not to be found in the statute. If the words used have one meaning, we cannot interpolate words not used in order to reach a construction deemed more equitable by those whose duty it is only to administer the law as they find it written.

We admit that if the statute be followed according to its terms, Captain Morris will receive a larger pay than a captain his senior, who was promoted to fill the vacancy created by the board. If this is anomalous or inequitable, it is because the law has made it so. Captain Morris cannot under any such plea be deprived of his pay given by the act of 1835, because the act of 1855 modifies the pay of some one else.

The rule for the construction of statutes is a very plain one. The intention of the legislature must govern, it is true, "but it must be such an intention as the legislature have used fit words to express." (Dwarris, 561.)

When a law is plain and unambiguous, whether expressed in general or limited terms, the legislature must be understood to mean what they have clearly expressed, and there is consequently no room

left for construction.—(United States *vs.* Fisher, 2 Cranch 385; United States *vs.* Morris, 14 Pet., 46.)

We can only judge of the import and intention of a statute by its terms, any other rule would lead us into endless and fruitless conjecture and hopeless confusion.—(Barker *vs.* Estry, 19 Vermt., 131.)

“I cannot tell,” said Paterson J., “what consequences may result from the construction which we must put upon the statute, but if mischievous they must be remedied by the legislature.”—(Regina *vs.* Justices Lancashire, 11 A. & E. 157.)

“Our construction may operate to defeat the object of the statute, but it is better to abide by the consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to be the intention of the legislature.”—(Rex *vs.* Barham, 8 B. & C., 104.)

These rules which control the judiciary apply with increased force to the executive departments of the government.

One of the consequences of this departure from the plain terms of the law is seen in the facts stated in the 9th article of the agreement. “The department pays full pay to the officers promoted to fill vacancies created by the retiring board, so far as it does not exceed the aggregate pay of the several grades of the service.”

Thus it is seen that not only is the law violated in excluding Captain Morris from his full pay, but that a further violation is made in giving full pay to officers who, it is admitted, were “promoted to fill the vacancies created by the reserved list.” The law says that officers thus promoted shall receive modified pay. The Secretary of the Navy says they shall have full pay.

The object of the act of 1855 was not to *decrease* the aggregate pay of the navy, it provided that “nothing in this act contained should be held or construed to authorize any *increase* of the aggregate pay,” &c.

The aggregate pay was to remain as it was prior to that act. But the departmental construction, which refuses full pay to Captain Morris, would have *decreased* the aggregate pay of the navy. In order to avoid a result not contemplated by the act it was necessary to give that pay to some one else. This has been effected by denying to Morris, and those in *consimili casu*, the pay they were entitled to, and giving it to others who the law says shall not receive it.

In the letter of the Auditor, heretofore referred to, he says: “I have to state that it will make no difference in the aggregate pay of the navy, so far as I can perceive, whether the rule prescribed by the Secretary of the Navy, in regard to the rate of compensation of Captain Henry W. Morris and other officers similarly situated be observed, or that insisted on by Captain Morris; since the same number in the several grades, agreeably to the practice of the department, would receive the full pay, and the only difference would be as to the grounds of selection of the persons to whom it should be allowed. When Captain Dulany died the full pay which he had been receiving, and which was claimed by Captain Morris, though not granted to him, was awarded to another officer who had been in receipt of inferior pay.”

It is submitted that this is not a question of “selection,” or the

power of the secretary to "award." The pay of officers does not depend upon any discretionary power of the executive, but upon the fixed and ascertained will of the legislative department, as found in the statutes of Congress.

There is, then, not only a violation of law in granting officers who were "promoted to fill vacancies created by the retired list" full pay, but the law is further violated in the *discrimination* which is made in the pay of officers of the same rank.

About one-half of the officers, as we understand, who were thus promoted now receive full pay, while the balance who were promoted in the same manner receive but the modified pay. The law recognizes no distinction between seniors and juniors of the same rank as to their pay, with but the single exception of the senior captain of the navy; as to "all other captains" the rate of compensation is made uniform.

The department, proceeding on the assumption of a power of "selection," has distributed the surplus created by withholding from Captain Morris and those similarly situated the pay their rank entitles them to, under the act of 1835, and which is understood to exceed one hundred thousand dollars among the senior officers thus promoted. If this power of selection exist, we may admit that it has been exercised equitably, but we deny that it has any warrant in law.

We maintain therefore that the rule adopted by the department involves three violations of law:

First. It refuses to Captain Morris pay which is guarantied to him by the act of 1835, and which is not in "conflict with the provisions" of the act of 1855.

Second. It gives full pay to some of the officers promoted to fill the vacancies created by the "reserved list," in express contradiction of the provisions of the act of 1855.

Third. It discriminates among officers of the *same rank* who were "promoted to fill the vacancies created by the reserved list," giving full pay to some and modified pay to others, in opposition to the provisions of the act of 1835, which, with the exception of the senior captain, places all officers of the same rank on one equal footing as to pay.

It is insisted by the solicitor that this departmental decision derives some support from the third section of the act, which is as follows:

"That nothing in this act contained shall be construed to restrict, apply to, or impair, the *regular promotion* of officers in the same list of the navy who may be at any time entitled to promotion—consequent upon deaths, dismissals, or resignations in the naval service—nor in any manner to abridge or impair the right of the Secretary of the Navy to place any officer upon furlough."

The solicitor contends that the *pay* of an officer is included in his *promotion*, and as the statute declares that the act should not be considered as restricting, applying to, or impairing that promotion, so neither does it restrict, apply to, or impair his pay; and he further contends that the officers named in the second section as "officers who may be promoted to fill the vacancies created by the reserved list," are within the influence of the third section as construed by him.

The answer to this is obvious.

First. That pay and promotion are distinct things. That they are both regulated by law, and therefore one may exist without the other.

Second. Assuming that pay as well as promotion was included in the third section. Yet to hold that it extended to "officers who may be promoted to fill the vacancies created by the reserved list" would make the third section irreconcilable with the second section, and thus operate its repeal in opposition to the cardinal rule of construction, that full effect will be given to all parts of a statute when its terms will permit it.

Third. If the third section extended to officers thus promoted, it extends to the *whole* class and not a *portion* of them, and yet the agreed statement of facts shows that but a *portion* receives their full pay.

Fourth. The term "regular promotion of officers" in case of "deaths, dismissals, or resignations," was used in apposition to the *unusual* or *irregular* promotions to vacancies created by the reserved list, and not as synonymous with them.

Fifth. If the pay, as is contended, inevitably accompanies the promotion referred to in the third section, it establishes conclusively the right of Captain Morris, for he is within the precise description of the section, being an officer "on the service list of the navy," "entitled to promotion," and actually promoted in consequence of a vacancy created by "death."

We submit, in conclusion, that there is no view that can be taken of this case by a tribunal organized to construe or enforce the law, which will deprive Captain Morris of his claim under the act of 1835. That act was a general one, passed for the purpose of regulating permanently the pay of the navy. The act of 1855 was a special one, passed for another purpose. The pay of officers who received a particular promotion only is regulated by it. Those officers are referred to in a class. That class is well defined. There can be no more doubt as to the persons who are included in it than if those who compose the class had been designated by their proper names. All other persons are therefore unaffected by it, and remain under the influence of the act of 1835. Whether the law is equal or unequal, whether just or inequitable, are questions not for the courts, nor for executive officers, but for that department upon which the Federal Constitution has conferred its legislative powers.

P. PHILLIPS,
Solicitor for petitioner.

WASHINGTON, *February* 28, 1858.

Agreed statement of facts.

1. Captain Bladen Dulany was commissioned on the 8th of September, 1841, and died on the 26th of December, 1856.

2. The petitioner, Commander Henry W. Morris, was nominated to the Senate as captain, vice Bladen Dulany, deceased, and this nomination was confirmed on the 13th of March, 1857, to date from the 28th of December, 1856.

3. The amount claimed in the petition as due by the government,

if the petitioner is not included in the second section of the act of February 28, 1855, entitled "An act to promote the efficiency of the navy."

4. On the 14th of September, 1855, there were promoted to fill vacancies on the active list 34 captains, 73 commanders, and 157 lieutenants—264 in all. Of these 63 were promoted to fill pre-existing vacancies, and 201 to fill vacancies created by the retiring board.

5. The aggregate pay of the navy will not be increased by paying the petitioner and those who stand in the same position the full pay claimed, if those who were promoted to fill the vacancies occasioned by the retiring board are confined to the modified pay provided by the second section of the act of February 28, 1855.

6. The petitioner would not have been entitled to promotion on the death of Captain Dulany, had not a senior commander, V. M. Randolph, been previously promoted to fill a vacancy in the rank of captain created by the retiring list.

7. Had not Commander V. M. Randolph been previously promoted to fill a vacancy created by the retired list, he would have been entitled to promotion to the vacancy occasioned by Captain Dulany's death.

8. If the petitioner be paid, the aggregate pay of the navy will be increased, unless full pay be denied to some captain, who is senior to the petitioner.

9. The department pays full pay to the officers promoted to fill vacancies created by the retiring board, so far as it does not exceed the aggregate pay of the several grades or of the service.

J. D. McPHERSON,
Deputy Solicitor.

P. PHILIPS,
Solicitor for Petitioner.

TREASURY DEPARTMENT,
Fourth Auditor's Office, January 12, 1858.

SIR: In reply to your letter of the 5th instant, I have to state that it will make no difference in the aggregate pay of the navy, so far as I can perceive, whether the rule prescribed by the Secretary of the Navy, in regard to the rate of compensation of Captain Henry W. Morris, and other officers similarly situated, be observed, or that insisted on by Captain Morris; since the same number in the several grades, agreeably to the practice of the department, would receive the full pay, and the only difference would be as to the grounds of selection of the persons to whom it should be allowed. When Captain Dulany died, the full pay which he had been receiving, and which was claimed by Captain Morris, though not granted to him, was awarded to another officer who had been in receipt of inferior pay.

The ground upon which Captain Morris was determined by the Secretary of the Navy to be entitled only to the modified compensation allowed by the act of February 28, 1855, is stated in the letter of the Secretary to this office of the 5th of August last. It is, that, although

he was not promoted immediately to a place vacated by an officer put upon the reserved list, he was nevertheless promoted "*by the operation of the act,*" which prescribed the modified pay.

This office has not received from the Secretary any further information as to the reasons upon which his decision was founded, though I can easily conceive that he would be disposed to give such a construction to the law as would avoid the allowance of higher pay to junior officers than that received by their seniors of the same grades who were filling the places vacated by those put upon the reserved list, and who, according to Captain Morris' idea, must be confined perpetually to the modified compensation prescribed by the act of February 28, 1855.

I am, sir, very respectfully, yours, &c.,

A. O. DAYTON.

J. D. McPHERSON,
Deputy Solicitor Court of Claims.

IN THE COURT OF CLAIMS.

No. 1596.

HENRY W. MORRIS *vs.* THE UNITED STATES.

Solicitor's brief.

Henry W. Morris was a commander in the navy when the retiring board sat under the act of February 28, 1855, "to promote the efficiency of the navy."

There were at that time sixty-eight captains in the navy, the number being limited by law.

Under the provisions of that act these captains were distributed into two classes, an "active service list" and a "reserved list."

Although these lists were in fact created by the act, yet the act assumes that the officers placed upon the reserved list had been taken from the active service list, and directs that "vacancies created in the active service list by placing officers on the reserved list shall be filled by regular promotion in the order of rank or seniority."

This being done, the active service list alone contained as many captains as there had previously been in the navy, being the full number limited by previous laws; and besides these there were a number of captains upon the reserved list. So that the entire number of captains in the navy after the 28th of February, 1855, and on the 23d of December, 1856, exceeded the number authorized and in service on the 28th of February, 1855, by the number on the reserved list.

On the 26th of December, 1856, Captain Dulany died. He was one of the older captains commissioned before the 28th of February, 1855, and the act of this date had had no operation upon him.

Henry W. Morris, being the senior commander, and as such next entitled to promotion, was promoted to be a captain

What authority had the President to make this promotion?

What authority had the President, on the 27th of December, 1856, to appoint Morris a captain in the navy?

His authority must be found in the statutes.

It was under no acts prior to the efficiency act of February 28, 1855. All acts up to that date authorized only sixty-eight captains in the navy, and after Dulany's death there were still ninety-eight captains in the navy, viz: sixty-seven on the active service list, and thirty-one on the reserved list.

Those on the reserved list were captains in the navy, and must be counted in the statute number.

1st. Because, if they were not, no special provision would have been needed to enable the President to fill the vacancies on the active list. If these captains were out of the statute number the President could have filled it up without legislation.

2d. Because their pay is counted as a part of the pay of the grade, in making up the aggregate, which, by the act, is not to be increased.

3d. Because they are counted in the aggregate number of officers of the navy, which, by the act, must not be increased.

They are then officers of the navy, and, being captains, are part of the number limited by law. Counting them, there were ninety-eight captains in the navy after Dulany's death; where did the President get authority to appoint the ninety-ninth captain?

The death of an officer does not necessarily create a vacancy. The office may expire with him. A provision of this kind is one mode of reducing the number of officers without dismissing any. Thus, by the act of August 4, 1842, (5 Stat., 592,) the midshipmen in the navy were diminished, and by the act of July 19, 1848, certain supernumerary officers of the army were provided for without permanently increasing the army.

A mere death then does not necessarily leave an office vacant. We must look to see whether, after that event, an office exists by law which is not filled.

Such was the question on the 27th of December, 1856.

The decision of this question depended entirely on the construction of the act of February 28, 1855; whether the power to fill vacancies in the active list was a temporary authority to be exercised but once, or whether it was a continuing authority to be so exercised as to keep the active list full. The power was to fill vacancies created by placing officers on the reserved list. This was the only power the President had or has to appoint a captain while sixty-eight other captains are in service.

The President promoted Morris, thus deciding that the clause above cited in the act of 1855 authorized him to keep the active list full.

It is indifferent to the decision of this claim whether the President acted in conformity with law or not. If wrong, Morris is not legally a captain, and cannot recover the pay. If right, he was appointed by virtue of the authority given the President to fill "vacancies created by placing officers on the reserved list." He has received the pay allowed by law to such officers.

That he was nominated to the Senate to be appointed a captain, "vice Bladen Dulany, deceased," was a mere mode of advising the

Senate that the authorized number of captains had been diminished by death; the Senate usually consents to the appointment in the precise words of the nomination, and did so, I presume, in the present case. But this did not put Morris in Dulany's place. He took place at the foot of the list, whereas Dulany was high up on the list.

On the ground that Morris was one of the "officers promoted to fill vacancies created by the reserved list," he had been denied full pay by the Navy Department, and allowed only the modified pay provided for that class of officers by the act cited. I think I have shown that Morris answered this description.

But it is said only a limited number of officers can answer that description at any one time, and there were already among the captains this number of individuals, being the very individuals who had been promoted to fill the vacancies created by the reserved list, *i. e.*, the first appointees to the vacancies; that they certainly answered the description, and if they did, none others could.

The captains here spoken of are senior to Morris. One of them, Victor M. Randolph, has, on the death of Dulany, succeeded to full pay. The position contended for by the petitioner would condemn Randolph to the lower rate of pay, while Morris, his junior, would take the higher rate.

It cannot be supposed to have been the intention of Congress to take away from any officer retained in active service, and advanced in rank by that act, any right which he would have enjoyed had the act not been passed. The officers found inefficient were to be displaced, and the efficient ones advanced. But the doctrine contended for would deprive Randolph, one of these efficient officers, of the pay which he would now be entitled to if he had not been promoted under the act. If he had been left on the list of commanders instead of being promoted to fill one of the vacancies created by the reserve list, he, and not Morris, would have been entitled to Dulany's vacancy, and, according to the doctrine contended for, to Dulany's pay. His promotion under the act is insisted on as the ground, and the only ground, for refusing him full pay, and giving it to his junior.

The idea of the petitioner is, that the officers first promoted to fill the vacancies created by the reserve list always thereafter do, and no others ever do, answer that description; that it attaches to them as individuals, not as a class. If this be true, a master promoted to be a lieutenant in place of a lieutenant placed on the reserved list would not outgrow the distinctive mark, even if he should live to be a commodore. It would still be said of him, with truth, he was promoted to fill a vacancy created by the reserve list, and being unemployed can receive only the leave of absence pay to which he would have been entitled if such promotion had not been made. It is evident that the construction contended for would bar any future increase of the proposed officer's pay, and fix it thereafter at the rate which he would have received if the promotion had not taken place. This consequence is so absurd as imperatively to forbid the construction which involves it.

The third section of the act was intended to guard the rights of officers. It forbids any construction which would impair the regular

promotion of officers. I contend this means not only the right to be promoted, but all the rights consequent upon promotion—pay and command. As protecting simply the right to be promoted, it was utterly vain and useless. The act necessarily increased the number of officers in every grade except the lowest, and it accelerated promotion everywhere and retarded it nowhere.

See Attorney General Cushing's opinion, of February 14, 1856, on this question.

Again, it was not the design of the act to *lessen* the pay of the several grades. The provision that the aggregate pay is not to be increased, implies that it may remain the same. If, then, an officer on the reserved list dies, who, according to the petitioner's construction, would succeed to his pay? None of the old captains, for they have full pay already; none of the new captains, for they are "promoted to fill vacancies;" and there is no other person to take it, as nobody is promoted, for promotions only take place to keep full the active list. Nobody, then, can receive the pay, and the aggregate pay of grade is by so much diminished, and if all the captains on the reserved list should die, the aggregate amount paid to officers of that grade would be diminished by the amount of the pay of thirty-one captains.

The doctrine that none but the first appointees answer the description of the act leads to another consequence violative of the act. The act declares that none of its provisions shall be so construed as to increase the aggregate pay of the several grades. Hence all the new captains, in excess of the original limited number, have modified pay—not that of captains. If one of these die, and a commander be promoted to fill the vacancy, such commander, when promoted, would, according to the petitioner's construction, be entitled to full pay, the vacancy not being created by the reserved list. Then the new appointee would receive more than his predecessor, and the aggregate pay of the grade, which was up to the limit before, would necessarily be increased beyond the limit, which is contrary to the act.

I maintain, therefore, that the decision of the Secretary of the Navy upon this claim is correct.

1. Because Morris was promoted by virtue of the authority given the President by the act of February 28, 1855, to promote officers to fill vacancies created by the reserved list, and must, therefore, be considered as one of the officers so promoted.

2. Because any other construction of the act will violate the rights of senior officers, which are intended to be protected by the 3d section of the act.

3. Because the construction of the act contended for by the petitioner would, in some cases, lessen the aggregate pay of the several grades.

4. Because the same construction would, in certain cases, increase the pay of the several grades.

The true construction of the act must be such as will not involve consequences which the act itself prohibits.

J. D. McPHERSON,
Deputy Solicitor.

MORRIS *vs.* THE UNITED STATES.

Opinion of Judge BLACKFORD adverse to the claim.

This suit is brought to recover a certain balance of pay which the claimant alleges to be due to him as a captain in the navy of the United States.

The act of Congress of the 28th of February, 1855, entitled "An act to promote the efficiency of the navy," provides, among other things, that the officers of the navy in the grades of captain, commander, lieutenant, masters, and passed midshipmen, found incapable of performing their duties, should be dropped from the rolls or placed on a reserved list; that those officers thus placed on the reserved list should receive certain reduced pay; that the vacancies created in the active service list, by placing officers on the reserved list, should be filled by regular promotion in the order of rank or seniority; and that officers who might be promoted to fill the vacancies created by the reserved list should receive certain reduced pay.—(10 Stat. at Large, 616.)

In consequence of that act there were a large number of captains placed on the reserved list, and the vacancies thereby created in the active service list were filled, in September, 1855, by the promotion of commanders in the order of their rank or seniority. Among the officers so promoted from the grade of commanders to that of captains, and who accordingly received the reduced pay, was Victor M. Randolph. That officer, at the time of his promotion, stood, on the navy register, thirty numbers above Commander Morris, the present claimant. There being on the service list of commanders, at the time said vacancies were filled, a greater number of officers above Commander Morris than were required to fill those vacancies, he remained, after those vacancies were filled, in the grade of commanders. Afterwards, on the 26th of December, 1856, Captain Bladen Dulany, one of the captains receiving full pay, died; and said Captain Randolph, passing, according to the established order of promotion, into the place left vacant by Captain Dulany's death, was considered, by the Secretary of the Navy, to be entitled to full pay, and the same was paid to him accordingly. On the 13th of March, 1857, the present claimant, Morris, then a commander, was (according to a statement in the agreed case) nominated to the Senate as a captain *vice* said Bladen Dulany, deceased, and the nomination was confirmed on the 13th of March, 1857, to date from the 28th of December, 1856.

The claimant, Morris, has received, since the date of his commission as captain, the reduced pay allowed by said act of 1855 to captains promoted to fill the vacancies created by the reserved list. He now brings this suit to recover the difference between the reduced pay thus received and the full pay prescribed by the act of the 3d of March, 1835.—(4 Stat. at Large, 755.) That difference is stated by the petition to have amounted, on the 1st of November, 1857, to the sum of \$592 59.

We are of opinion that the decision of the Secretary of the Navy is correct. The full pay vacancy created by the death of Captain Dulany

was filled by the advance in regular order of promotion of Captain Randolph. This advance of Captain Randolph, and the consequent advance of the captains standing below him, occasioned a vacancy at the end of the active service list of captains. That would have been the course previously to said act of 1855, on the death of one of the captains; and that act expressly provides against any change in such proceeding. It enacts that nothing in it "shall be construed to restrict, apply to, or impair, the regular promotion of officers in the service list of the navy who may be at any time entitled to promotion, consequent upon deaths, dismissals, or resignations, in the naval service." The said vacancy at the end of the active service list of captains was a reduced pay vacancy, and was to be filled by the promotion of a commander. The commander entitled to fill that vacancy was Morris, and he was promoted accordingly. It is true that Morris does not fill a vacancy immediately created by the reserved list, but he stands in the place of one who did fill such vacancy, and we consider him entitled to the same rank and command, and to the same pay of the officer whose place he occupies. The two captains, Randolph and Morris, cannot both receive the full pay, for the reason, were there no other, that such pay to both would increase the aggregate pay of the grade of captains, which said act of 1855 expressly forbids. Hence, if Morris be allowed full pay, his senior officer, Randolph, can only have the reduced pay. We do not believe that Congress intended, by the act of 1855, that any junior officer should have higher pay than his seniors of the same grade.

The case before us seems to be the same in principle as if a vacancy had been created by the death of one of the reduced pay captains. Such a vacancy would be filled by the promotion of the senior commander; and it is clear that he could not receive full pay, because that would increase the pay of the grade, which, as before said, is forbidden by the act of 1855. The vacancy in such case, as in the one before us, would not be immediately created by the reserved list.

Our opinion is that the claimant has no cause of action.

IN THE COURT OF CLAIMS.

HENRY W. MORRIS *vs.* THE UNITED STATES.

Opinion of SCARBURGH, J., adverse to the claim.

Bladen Dulany was commissioned a captain in the navy of the United States on the 8th day of September, A. D. 1841. He died on the 26th day of December, A. D. 1856. At the time of his death he was on the active service list, and in the receipt of the regular pay of a captain.

The petitioner was nominated to the Senate as captain, *vice* Bladen Dulany, deceased, and his nomination was confirmed on the 13th day of March, 1857, to bear date from the 28th of December, 1856. He has received pay as a captain to the 1st day of November, A. D. 1857,

at the rate of \$2,800 a year, as prescribed by the act of February 28, A. D. 1855. He further states as follows: That under the act of 1835, which regulates the pay of officers of the navy, his pay from December 27, A. D. 1856, to November 1, 1857, is..... \$2,960 97
That he has received..... 2,368 38

And that there is still due and unpaid..... \$592 59

In an "agreed statement of facts," signed by the counsel for the petitioner and the deputy solicitor, it is further stated as follows:

"3. The amount claimed in the petition is due by the government, if the petitioner is not included in the second section of the act of February 28, 1855, entitled 'An act to promote the efficiency of the navy.'

"4. On the 4th of September, 1855, there were promoted, to fill vacancies on the active service list, 34 captains, 73 commanders, and 157 lieutenants—264 in all. Of these 63 were promoted to fill pre-existing vacancies, and 201 to fill vacancies created by the retiring board.

"5. The aggregate pay of the navy will not be increased by paying the petitioner and those who stand in the same position, the full pay claimed, if those who were promoted to fill the vacancies occasioned by the retiring board are confined to the modified pay provided by the second section of the act of February 28, 1855.

"6. The petitioner would not have been entitled to promotion on the death of Captain Dulany had not a senior commander, V. M. Randolph, been previously promoted to fill a vacancy created by the retired list.

"7. Had not Commander V. M. Randolph been previously promoted to fill a vacancy created by the retired list, he would have been entitled to promotion to the vacancy occasioned by Captain Dulany's death.

"8. If the petitioner be paid, the aggregate pay of the navy will be increased, unless full pay be denied to some captain who is senior to the petitioner.

"9. The department pays full pay to the officers promoted to fill vacancies created by the retiring board, so far as it does not exceed the aggregate pay of the several grades, or of the service."

The petitioner claims the above-mentioned sum of *five hundred and ninety-two dollars fifty-nine cents*.

In the construction of the act of February 18, A. D. 1855, (10 Stat. at Large, p. 616,) there are several prominent points contemplated by it which must not be disregarded:

1. That the active-service list shall not be reduced.

2. That, in view of this object, promotions are directed to fill vacancies, created in the active-service list, by placing officers on the reserved list.

3. That officers promoted to fill the vacancies created by the reserved list shall receive the modified pay prescribed by the act.

4. That the aggregate pay of the several grades embraced by the

act or of the naval service, as then allowed by law, was not to be increased.

5. That nothing in the act contained shall be construed to restrict, apply to, or impair the regular promotion of officers in the service list of the navy, who may be at any time entitled to promotion, consequent upon deaths, dismissals, or resignations in the naval service.

These several objects are so plainly contemplated by the act, that if the words be susceptible of it, such a construction must be adopted as will not defeat any of them. This, I think, can be done without difficulty, at least as regards the petitioner's case.

V. M. Randolph was promoted to fill a vacancy created by the reserved list. This was a special promotion, authorized by the act of 1855. It gave him the office, but not the pay of a captain; it entitled him only to the modified pay allowed by that act. It was not full promotion, but a promotion for the purposes of the act of 1855. No vacancy had occurred in the office of captain in the navy, but only in the active service list of the grade of captain. No officer of that grade in the navy had died, been dismissed, or resigned; the promotion, therefore, was peculiar and imperfect. It was something entirely distinct and separate from the promotion which was previously known in the navy, and which was to continue, and does continue, unimpaired and unrestricted by the act of 1855, because that act shall not be construed to apply to such promotion. Although it was a "regular promotion, in the order of rank and seniority," in the sense of the second section of the act of 1855, yet it plainly was not "the regular promotion" mentioned in the third section of the act. To the latter promotion, it must be borne in mind, the act does not apply. Hence, upon the death of Dulany, Randolph became entitled to "the regular promotion" referred to in the third section of the act. This is obviously true, for otherwise the act of 1855 would *apply* to such promotions, and *restrict* and *impair* them, which is expressly forbidden. By that promotion he would become entitled to the regular pay of a captain; but he was already commissioned as a captain, and enjoyed the office and rank of a captain. To complete his promotion, to make it what it would have been if the act of 1855 had not been passed; in a word, to give him "the regular promotion" mentioned in the third section of that act, to which he had become entitled, it was only necessary to allow him the regular pay of a captain. This being done, he was no longer an officer promoted to fill a vacancy created by the reserved list, but enjoyed a promotion consequent upon the death of his senior officer.

The effect of V. M. Randolph's promotion to fill the vacancy occasioned by the death of Dulany, was to leave a vacancy created by the reserved list unfilled. The petitioner was entitled to this, and it was given to him; and thus it was again "filled by regular promotion in the order of rank or seniority," in pursuance of the provisions of the act of 1855. He was promoted to the office of captain, with the modified pay allowed by that act, and fills a vacancy created in the active-service list, by placing officers on the reserved list. A similar promotion must occur whenever a captain, who was promoted to fill a vacancy created by the reserved list, dies, for otherwise the active-

service list could not be kept full ; but it is a special promotion under the act of 1855, and entitles the officer promoted only to the modified pay of that act. It cannot be " the regular promotion " to which the act does not apply, for if it were, the aggregate pay of the grade would be increased. It is emphatically a promotion to fill a vacancy on the active-service list created by the reserved list.

The captains on the reserved list are out of the line of promotion, and receive leave of absence pay, or furlough pay, but they are not out of office. When one of them dies, there is a vacancy in the office of captain in the navy, and a regular promotion consequent upon his death must take place. His office, however, has already been filled, but *sub modo* only. He continued to hold it till his death, but his place on the active-service list, made vacant by his being placed on the reserved list, was filled by one who has the office and rank, but not the pay of a captain. Upon the death of the retired officer, the senior officer upon the list of those promoted to fill vacancies created by the reserved list, becomes entitled to regular promotion—the promotion consequent upon the death of his superior officer—and to regular pay. He has already the office and rank of captain ; to consummate his promotion, to make it the regular promotion to which he is entitled, and to which the act of 1855 does not apply, it is only necessary to give him in addition the regular pay of a captain. He is then no longer an officer promoted to fill a vacancy created by the reserved list ; and the aggregate pay of his grade, or of the naval service, is not increased. Thus the number of those promoted to fill vacancies created by the reserved list will on each successive death, resignation, or removal of the officers on the reserved list be reduced, until upon the death, resignation, or removal of the last survivor, all the officers on the active-service list will be entitled to and enjoy full promotion and regular pay.

Such, it seems to me, is the proper construction, and the true spirit and operation of the act of 1855. This construction interferes as little as practicable with the previously established principles governing the naval service, especially as regards grade and seniority. It is consistent alike with the words and spirit of the act ; it contemplates the act as a whole, regarding the dependence and connexion of the several parts, and giving due effect to each. But the construction contended for by the petitioner gives undue weight to one portion of the act at the expense of another portion. It disturbs the order of rank and seniority in the navy, by giving to a younger officer higher pay than it gives to his senior and superior in rank, whilst it was obviously the intention of the act to guard against such a disturbance. It restricts and impairs regular promotions in the navy, in direct conflict with the express provisions of the third section of the act. It disregards the principle that one part of a statute must be so construed by another, that the whole may if possible stand. In a word, it is, it seems to me, inconsistent with both the language and spirit of the act considered as a whole.

My opinion is that the petitioner is not entitled to relief.

IN THE COURT OF CLAIMS.

HENRY W. MORRIS *vs.* THE UNITED STATES.

LORING, Justice.

As I dissent from the opinion of the majority of the Court, I am to state my reasons for my dissent:

The petitioner was promoted to be a captain in the navy by a commission "to date from the 28th of December, 1856," and to which he became entitled in the order of rank or seniority on the death of Captain Dulany, which took place on the 26th of December, 1856. The petitioner alleges that by such promotion he became entitled to the full pay prescribed for officers of his grade by the "Act to regulate the pay of the navy of the United States" of March 3, 1835; (4 Stat. at Large, 755;) that he has been paid only the modified pay which, by the "Act to promote the efficiency of the navy" of February 28, 1855, (10 Stat. at Large, 616,) is prescribed for officers promoted to fill "the vacancies created by the reserved list," and he claims a balance of pay to be due to him.

The act of 1855, section 2, enacts as follows: "And officers who may be promoted to fill the vacancies created by the reserved list shall, while unemployed, receive only 'the leave of absence' or 'waiting orders' pay, to which they would have been entitled if such promotion had not been made; but when employed at sea, or on other service, they shall receive in addition to such 'leave of absence' or 'waiting orders' pay, the difference between 'the waiting orders' or 'leave of absence' pay and the lowest sea pay of the grade to which they may be promoted."

It is claimed by the United States that Captain Morris is one of the officers "promoted to fill the vacancies created by the reserved list," and is therefore within the provisions of the statute cited above; and the position is rested on the sixth and seventh propositions of the agreed statement of facts, which are as follows:

6th. The petitioner would not have been entitled to promotion on the death of Captain Dulany, had not a senior commander, V. M. Randolph, been previously promoted to fill a vacancy in the rank of captain created by the retired list

7th. Had not Commander V. M. Randolph been previously promoted to fill a vacancy created by the retired list, he would have been entitled to promotion to the vacancy occasioned by Captain Dulany's death.

It seems to me that the result of these propositions is, that the petitioner was not, and Captain V. M. Randolph was, promoted to fill a vacancy created by the reserved list; and that the consequence is, that the former is not, and the latter is, within the provisions of the 2d section of the act of 1855, c. 127, cited above. The description of the officers to whom those provisions are applicable is as specific and precise as it could be made. The words of the act are, "officers who may be promoted to fill the 'vacancies' created by the reserved list." The only "vacancies" referred to, are those created by the reserved list,

and *by that alone*, or without more ; and the only officers referred to, are those promoted for the purpose of filling such vacancies, and for *no other reason*, and other officers are not within the terms of the statute description.

The act of 1855, c. 127, "to promote the efficiency of the navy," was an expedient without precedent and without rule, other than its own text ; it was made and used for the occasion, and ceased with it. Its provisions, therefore, are not to be extended by construction beyond the plain reach of their terms. Its contemplated action was to create at once and altogether a great number of vacancies in every grade within its scope, and at once to fill these vacancies by promotions, and thus to advance many officers in each grade, sooner than they would have been advanced by the laws for the organization of the navy. This was the general consequence of the act, and its advantage occurred directly and especially to those officers in each grade promoted to fill the vacancies created by the reserved list. There might be a reason and an equity, therefore, in qualifying this advantage by the provisions in the 2d section modifying the pay of such officers, and in confining those provisions to them.

And if the provisions of the statute, construed according to the ordinary meaning of their terms, meet the general consequence of the act, it is no reason against such construction or for transcending the letter of the statute, that, in the peculiar circumstances of a particular case, it works a hardship or a result not contemplated ; for every statute does that, and it is unavoidable, for the variety of circumstances of particular cases is beyond the compass of human forecast.

And whatever may have been the reasons of the legislature for the provisions of the 2d section referred to, if the description of the class of officers to whom those provisions are there applied is clear and unambiguous, then those provisions cannot be extended by judicial construction to other officers not within the letter of that description ; for it cannot be shown that such other officers are within the reasons which induced those provisions, and by the general rule the specification of *one class* in a statute excludes all other classes. Now, on the facts, Captain Morris is not within the letter of that description, for he was promoted to fill a vacancy in the complement of a grade created by the death of Captain Dulany ; and upon the argument of the solicitor, he was promoted to fill such a vacancy created by the reserved list *and* the death of Captain Dulany, and that does not bring him within the letter of the statute description ; while Captain Randolph, when he was promoted from a commander to be a captain, was, as is admitted, promoted to fill a vacancy created by the reserved list, and since then he has not been promoted at all.

The argument for the United States assumes as its basis that by Captain Dulany's death some change took place in the position of Captain Randolph which entitled him to full pay. This proposition is necessary to sustain the defence, but those who adduce it must put their finger on the change and show just what it was, and they then must produce the laws which authorize the increase of an officer's pay for the change in position shown. It seems to me that Captain

Dulany's death produced two, and only two changes, in the position of any and all of the officers below him.

First it created a *vacancy* in the complement of the grade of captains, and it did not and could not create any other *vacancy*, for, as used in the statutes, the word *vacancy*, refers to the complement of a grade, and is predicable of nothing else; and this vacancy can be filled only by *promotion*, and that means, in the statute, *advance in grade*; of its own force it involves a change of grade—a single act, from its nature complete at once, and not subject to degrees in its maturity.

Now it is certain that Captain Randolph did not succeed to this *vacancy* in the complement of the grade of captain, and that Captain Morris did; and that Captain Randolph was not "promoted," and that Captain Morris was; so that this first consequence of Captain Dulany's death made no change in the position of Captain Randolph.

The second consequence of Captain Dulany's death was, that all the captains below him were advanced in "the order of rank or seniority, and that Captain Randolph being next in that order to Captain Dulany, succeeded to the seniority he had held. This was undoubtedly a change in Captain Randolph's position; but mere seniority in the same grade has nothing to do with pay, and there is no law which authorizes the increase of the pay of an officer for an advance in mere seniority in his grade. Captain Dulany's seniority did not make or enter into his title to his full pay, and it cannot of its own force make such title for his successor in that seniority, and in nothing else.

The result that gave to Captain Randolph full pay upon Captain Dulany's death seems to have been reached by assuming that Captain Dulany's death made a *vacancy in the full pay list*, to which Captain Randolph, as next in order of rank or seniority, succeeded, and that thereby he was removed from the class of officers "promoted to fill vacancies created by the reserve list;" and his promotion, imperfect before, was completed. Such an arrangement may be efficient to prevent the alleged anomaly of a junior officer receiving higher pay than his senior in the same grade; but the question in the case is, where is the law which authorizes such an arrangement or furnishes the machinery for it? which recognizes such things as a *vacancy in the full pay list*, or "a promotion" of gradual growth and maturity, imperfect when made, and completed by subsequent contingencies?

The only "*vacancies*" recognized by the statutes are vacancies in the complement of a grade, and these are filled only, and at once completely, by that advance in the grade which, by the statutes, is "*promotion*." On this fixed meaning of the words "*vacancies*" and "*promotion*" the statutes have organized the navy, and to assume other "*vacancies*," and then, on succession in them, to graduate the pay of officers and predicate the completion of their "*promotion*," seems to me to alter the statutes and the organization they make.

Nor can Captain Randolph's position be affected by the 3d section of the statute of 1855. That section by its terms refers only to officers whose promotions are "consequent upon deaths, dismissals, and resignations." And if, as I have contended, Captain Randolph was by Captain Dulany's death, advanced only in seniority of rank, and thereby received no *promotion*, in the statute meaning of that word,

then he in no way comes within the terms or scope of that 3d section; and, in my opinion, the 3d section of the act of 1855 removes from the operation of that act the promotion of all officers whose promotion was "consequent upon deaths, dismissals, or resignations." The words of that section are as follows: Sec. 3. *And be it further enacted*, That nothing in this act contained shall be construed to restrict, apply to, or impair, the regular promotion of officers in the service list of the navy who may be at any time entitled to promotion, consequent upon deaths, dismissals, or resignations in the naval service."

Captain Morris is directly within that description if any officer can be; and if his "promotion" is removed from the act of 1855 I can find no authority for separating from his promotion its consequences, the pay and emoluments fixed for his grade by the act of 1835.

It was argued for the United States that the construction of the act of 1855 must be such as will fulfil its enactment in the 2d section, "that nothing in this act contained shall be held or construed to authorize any increase of the aggregate pay of the said grades, or of the naval service as now allowed by law." But it is observable that this clause is expressly confined to the provisions contained in the act of 1855, itself, and can, therefore, operate on nothing else. It stands as a condition annexed to those provisions, and its utmost effect can only be that the provisions for the payment of officers contained in that act of 1855 shall not be carried out to increase the aggregate pay referred to. The clause does not refer to, and gives no authority to alter or reduce the pay, provided for in the act of 1835, ch. 27, and belonging to the officers within it, and the act of 1835 must be carried out as it stands, unless it has been repealed altogether or in part.

The 4th section of the act of 1855, ch. 127, enacts that "all laws and clauses of laws, so far as they conflict with the provisions of this act, are hereby repealed." Under such a clause, the conflict between the statutes of 1835 and 1855, to effect any repeal of the former, must appear as they stand together on the statute book, and there is no such conflict shown here. On the contrary, the 5th proposition in the agreed statement of facts, states thus: "The aggregate pay of the navy will not be increased by paying the petitioner and those who stand in the same position the full pay claimed, if those who were promoted to fill the vacancies occasioned by the retiring board are confined to the modified pay provided by the second section of the act of February 28, 1855." So that it is clear and agreed that both statutes may be administered together, and each according to its very letter. In such case, I think there is no authority for departing from the letter of either; and as, in my opinion, Captain Morris is within the provision of the statute of 1835, ch. 27, and is not within the second section of the statute of 1855, ch. 127, I am of opinion that he is entitled to the relief he prays for.

ALMANZON HUSTON.

JANUARY 18, 1859.—Reported from the Court of Claims ; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ALMANZON HUSTON *vs.* THE UNITED STATES,

(Recommitted by both Houses of Congress.)

1. The petition of the claimant as amended.
2. Depositions offered by the claimant, and numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9, transmitted to the Senate.
3. Certified documents and letters from the Post Office Department transmitted to the Senate.
4. Claimant's brief and argument.
5. United States Solicitor's brief.
6. Opinion of the Court adverse to the claim.

The original report, No. 16, of the Court of Claims to the Senate, and recommitted, is herewith returned to the Senate. The report of the House of Representatives was printed, and will be found in the printed House documents, report No. 197, 1st session 34th Congress.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said Court, at Washington, this 17th day of January,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, *Washington County, ss.*

To the honorable the Judges of the Court of Claims:

The petition of Almanzon Huston, a resident citizen of the State of Texas, respectfully sheweth unto your honors, that the government of the United States is justly indebted to him in the sum of \$21,160.

In the month of October, 1848, your petitioner became sub-contractor under one R. W. Martin for carrying the United States mail from Sabine town to San Augustine, in said State of Texas, a distance of twenty-eight miles, for the sum of \$575 per annum for two-horse coach service; and about the same time he became a sub-contractor under one George W. Grant to carry the mails from San Augustine to the city of Houston, upwards of two hundred miles, in two-horse coaches, and a horse mail from Huntsville to Washington, about seventy-five miles, for the annual compensation of five thousand one hundred dollars. Soon afterwards the service from Huntsville to Washington was increased to two-horse coach service, and an additional allowance was made petitioner by the Postmaster General of \$750; an increase of speed was also ordered from seven to five days on the lines, for which an additional allowance of five hundred dollars was made.

Your petitioner would represent that the increase of mail matter into Texas after the close of the war with Mexico was so great that it became impossible to transport it in two-horse coaches. An application was made to the Post Office Department for an increase of service, which was declined in consequence of annexation having taken place too late for the regular mail lettings in 1846. Your petitioner would state that the route in question was the great thoroughfare in and through the State of Texas, and over it had to be transported all the mails for a very large portion of the State. From this main route, branch routes distributed the mails through eastern, northern, and a large portion of middle Texas. The importance of this route rendered it essential, for the regularity of the mails throughout the State, that it should not only be kept up, but that sufficient service should be placed upon it to enable the contractor to carry the whole mail through.

Under these circumstances your petitioner placed on the entire route four-horse post coach service on the first of November, 1848, and continued it to the 30th day of June, 1850, when his contract expired. In his efforts to sustain this route, in spite of bad roads and high prices of everything, your petitioner spent three times the amount of his contract pay. His whole estate was expended in keeping up the public service and in preserving the regularity of the United States mails. Had he not performed the service he did, the whole mail facilities of the interior of Texas would have been useless, as they were supplied through your petitioner's efforts, and over his route.—(See papers on file.)

The whole amount allowed your petitioner, including the additional compensation, was \$6,894. The contracts which were made in the spring of 1850 by the General Post Office Department for precisely the same service, and which went into operation on the first day of July, 1850, amount in the aggregate, and at the lowest bids, to \$19,590. Therefore, your petitioner prays an allowance for the labor and service performed by him for the general government, (the benefits accruing from which flowed into the national treasury,) equal in amount to the difference between the sum he received and that which was allowed under the contract of 1850 for the same service, making the sum of \$12,696 per annum, or \$21,160 for the time he performed the service.

Your petitioner applied to the Congress of the United States for relief, and on the 12th of April, 1850, his application was referred by the Senate to the Committee on Post Offices and Post Roads; and on the 16th May following there was a bill reported, but no other action then had. In 1854, February 27, the subject was again referred to the appropriate committee, and on the 9th day of March a bill was reported, in words as follows:

"A BILL for the relief of Almanzon Huston.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Postmaster General be, and he is hereby, authorized to examine the claims of Almanzon Huston for additional compensation for carrying the mail from Sabine town to the city of Houston, and from Huntsville to Washington, in the State of Texas, and make such allowance as the said Postmaster General may deem just and equitable, and that the amount, if any be so awarded, be paid out of any moneys in the treasury not otherwise appropriated.*"

This bill was passed on the 7th day of April following, and sent to the House of Representatives for its concurrence. On the 19th of April, 1854, the bill was reported from the committee, and, on motion, laid on the table; and on the 17th January, 1855, it was again referred to the Committee on Post Offices and Post Roads, *which agreed to report the bill without amendment, and recommend its passage.* No report, however, was made, for the want of time, and Congress adjourned without any final action on the bill.

Your petitioner would also state that he is the original and only party in interest in the claim; and prays your honorable Court to frame such a bill for the action of Congress as will appropriate to him the said sum of \$21,160; and, as in duty bound, he will ever pray, &c.

A. H. EVANS, *Attorney for Claimant.*

THE STATE OF TEXAS, *San Augustine County.*

I, Almanzon Huston, do solemnly swear that the facts as set forth in the foregoing petition are just and true, to the best of my knowledge and belief, so help me God.

ALMANZON HUSTON.

Sworn to and subscribed before me, the undersigned authority, on this 12th day of June, 1855.

R. F. SLAUGHTER, *J. P.*

And now comes the said claimant, Almanzon Huston, by his attorney, Alexander H. Evans, and leave of the Court being first had and obtained, amends his original petition, to wit:

First. Make the last line on the first printed page read on the 1st of November, instead of in the month of November.

Secondly. Insert in the third line of the first page \$21,160, in lieu of \$14,894.

Thirdly. In the tenth line, second page, insert \$6,894, instead of \$6,985.

Fourthly. In thirtieth line, second page, insert \$19,590, instead of \$16,290.

Fifthly. In the nineteenth line, on second page, insert \$12,696 for \$9,365; and in lieu of \$14,827, insert \$21,160.

Sixthly. In second line, on third page, in lieu of \$14,827, insert \$21,160.

A. H. EVANS, *Attorney.*

UNITED STATES COURT OF CLAIMS.

ALMANZON HUSTON *vs.* THE UNITED STATES.

Brief.

This cause was before the Court of Claims in 1856, and it was then decided that petitioner showed a good cause of action, which entitled the plaintiff to relief; and the proof fully sustaining the allegations in plaintiff's petition, this honorable Court ordered and decreed that the plaintiff was entitled to recover of the United States the sum of \$11,490, and reported a bill accordingly to Congress, which was referred by the House of Representatives to the appropriate committee, and was, upon motion in the House, referred to the Court of Claims for a rehearing; and as all the questions of law in the case have been settled by the Court in its former decision in favor of the petitioner, the case is now again before the Court to be heard and determined upon its merits.

The petitioner claims nothing from the government but that which he is justly entitled to receive. His claim is not one of an ordinary mail contract, but grew out of a state of facts and circumstances which perhaps may never again arise. Under the government he became mail contractor under the first lettings of the mails in Texas after annexation, which contracts were made by the Postmaster General at a time when the department did not and could not know what mail service was required in Texas, from the fact that the govern-

ment had not then performed any mail service in the State. The late republic of Texas voluntarily merged her political existence in that of the American confederacy, upon no other conditions and stipulations than those of her sister States, that is, to be placed upon the same footing and have guaranteed and awarded to her all the rights, benefits, and privileges of her sister States.

Texas not having been a Territory of the United States, and the general government not knowing what mail facilities her citizens would need, under that state of facts she contracted on the routes of which the petitioner was contractor for two-horse hack service, which was wholly insufficient for part of the time to transport the mails on the routes in question, as proven by the testimony of a number of the most respectable and some of the most distinguished citizens of Texas; most of the witnesses being at the time officers of the United States government, and connected with the Post Office Department, and all of them cognizant of the facts about which they testify.

Then, was the government bound in good faith to grant to the citizens of Texas mail facilities sufficient to transport their mail matters? Most clearly so. If there was an error in letting out the contracts for a want of knowledge on the part of the government of what mail facilities the citizens of Texas would need for the transportation of their mail matter, that error should be corrected by the government, and justice done one of her citizens who has made great sacrifices for the benefit of the government for which he should upon every principle of justice be fully remunerated; for without four-horse post coach service the citizens of Texas would have been, for the time the petitioner carried the mails on the routes in question with four-horse service, in a manner without mail facilities on those routes, as is clearly proven by the testimony.

As all the questions of law having been settled by the Court in its former decision in the case as it now stands, it would seem to present but two questions of fact for the consideration and adjudication of the Court:

First. Was it necessary for four-horse post coach service to transport the mails on the routes of which the petitioner was contractor during the time for which he claims extra pay?

Second. Did he, the petitioner, perform four-horse post coach service on the routes for which he was contractor during the time for which he claims extra pay?

In support of the first fact, petitioner begs leave to refer the honorable Court to the testimony of General Sam Houston and General J. Pinkney Henderson, which prove conclusively that if it were necessary to carry the mails at all on the routes in question, four-horse post coach service was absolutely necessary to transport the mails on said routes; and to refer to the testimony of George L. Clapp, late mail agent of the Post Office Department, and to Colonel S. W. Blount, postmaster at San Augustine, at the time for which the petitioner claims extra pay, and to the testimony of other witnesses in confirmation of the same facts.

And in support of the second fact, petitioner begs leave to refer to the testimony of Thomas P. Collins, postmaster at Crockett, James B. Johnson, deputy postmaster at San Augustine, George L. Clapp, late mail agent, and General Henderson's testimony, and the testimony of every other witness whose testimony is before the Court, who has been interrogated in relation to the matter in question.

The late Postmaster General, in his letter of the 24th of May, to the Hon. R. Brodhead, refers to the report received at the department from Martin K. Smith, postmaster at Houston, of the weight of the mail at Houston, from the 14th of April, 1849, to the 13th of May of the same year, showing an average of 166 pounds and a fraction for each trip.

And also to his testimony that was before the Court, in which he states that the average weight of the mails was 400 pounds; which discrepancy Captain Snell could have very easily explained, had petitioner been able to have procured his additional testimony, but could not from the fact that his residence is to petitioner unknown, he having removed from Houston to one of the extreme frontier counties of the State. But James B. Johnson answers to the second set of interrogatories propounded to him, fully explaining any discrepancy in Captain Snell's statement. By reference to Mr. Johnson's answers it will be seen that about the time Captain Snell made the report referred to, all the mail matter from New Orleans for eastern, southern and western Texas was being sent up Red river and transported over petitioner's routes. In justice to Captain Snell, who is a gentleman incapable of making any statement not strictly correct, petitioner refers to certificates herewith filed, marked F.

The committee of the House of Representatives, to whom was referred the case as decided by this Court at a previous time, have erred in their report in saying that the travel probably justified the four-horse coach service, and it was therefore procured by those to be profited thereby. To rebut that presumption of the committee, petitioner begs leave to refer to the testimony of General Sam Houston, and the testimony of postmasters and of other witnesses who have been interrogated on that subject, which will show that four horses were barely able to transport the mail matter on the routes, and that a passenger could seldom or ever travel by the stages. And the committee have erred in saying that the petitioner paid a bonus of \$2,675 for the contracts, when, in truth and in fact, the sum of \$2,500 was paid by petitioner and Brooks for the stock on the line; and after the purchase of the stock and the transfer of the contracts to Huston & Brooks, petitioner was obliged from the conduct of his partner, Brooks, to purchase the entire interest in the contracts and stock, and to take the entire responsibility upon himself of the contracts with the government, which will appear by reference to the two letters from the Post Office Department, marked F, G, and the testimony of Mr. Dixon, all of which will show that it was not a matter of speculation with petitioner in taking the contracts from Brooks, but one of necessity.

Doubtless the contracts were let on the routes in question by the Postmaster General with a view to the mail service under the postal arrangement of the late republic of Texas, and which was sufficient at the time, as the mail matter of the republic was confined almost within the limits of her own territory, as no mail matter could, before annexation, leave a post office in the United States and come to Texas until the postage due the United States office was paid; but that, after annexation, the citizens of Texas coming under the postal arrangements of the general government, the mail matter increased to such a bulk that it required four-horse post coach service to transport it, of which the United States were the recipients of the increased revenue; and certainly upon no principle of justice could she ask one of her citizens to transport the mails of which she received the revenue without a just compensation, and that under a contract made at a time when it was not known what mail service would be required in Texas; and the presumption is, that the former contracts were disposed of by the original contractors, from the fact that they had become satisfied that they could not carry them out under their contracts; at least the petitioner soon became satisfied, after he had taken them upon himself, that they could not be carried out with two-horse hack service.

That this was not an act of unauthorized assumption by the petitioner, he became satisfied, when but little more than one-half of the period for which the contracts were let had expired, that he must abandon the contracts or place four-horse coach service on the routes. To those conclusions all the testimony irresistibly force the mind. Under that state of facts what did the petitioner do? He placed four-horse service on the routes, not, however, without the advice of George L. Clapp, then special mail agent for Texas, and General Sam Houston and Thomas J. Rusk, United States senators, and all of the postmasters on the routes, some of whom testify that they told him that he certainly would be paid for the extra service.

And as soon as he placed four-horse service on the routes he got Messrs. Houston and Kaufman to notify the department of this fact; and General Houston testifies that he never received any notice from the department that the petitioner would not be paid for the extra service. In addition to which, he got Colonel Blount, postmaster at San Augustine, (the residence of petitioner,) to notify the department of the increased service and the necessity for it; and Colonel Blount testifies that he never received any answer from the department that the petitioner would not be paid for his extra service, or any reply in answer to his letter to the department on the subject; and petitioner never received the letter of the 10th of June, referred to by the late Postmaster General, or any other letter from the department, notifying him, either directly or indirectly, that he would not be paid or compensated for his extra service.

Confine this case within the strictest rules that the committee of the House of Representatives, in their opinion, think all cases of implied responsibility with the government should be confined, and it is a case which entitles the petitioner to the relief he asks, because the

Postmaster General contracted with the original contractors (at the time when it was not known what kind of service would be required) perform certain service, and afterwards it became necessary to increase that service to carry out the contracts; and the petitioner performed that increased service, which the department accepted, and the government would not require the petitioner to perform treble the service that he had contracted to perform, and yet refuse to compensate him for his extra services. It cannot well be conceived how a stronger case of implied responsibility could be made out. Petitioner refers to the case decided at the last term of this Court, of the widow of the late James Reeside *vs.* The United States, which was affirmed by Congress making an appropriation to pay the same.

Petitioner most respectfully refers the Court to the decision made at the last term in this case, in which the rule of compensation is settled to be, that petitioner is entitled to pay according to the rate of the contract; and by that decision no payment was allowed him for his extra services, from Sabine town to San Augustine; and to refer to the testimony of General Sam Houston, now before the Court, which shows that petitioner run sixty-four horses on the routes from Sabine town to the city of Houston, and eight horses from Washington to Huntsville, as per schedule included in General Houston's interrogatories, which number of horses was required to run the distance under the schedule time, seventy-two hours.

Mr. Grant ran the route *from San Augustine to Houston in seven days*, with sixteen horses at a time, when the roads were uncommonly good; and petitioner ran the routes *from Sabine town to the city of Houston* in five days when the roads were most wretchedly bad, the time having been expedited by the Post Office Department from seven to five days. Petitioner refers your honors to the law as cited by your honors in its previous decision of this case.

A. HUSTON, *in person.*

WASHINGTON, November 12, 1857.

Public Meeting.

A large and respectable meeting of the citizens of San Augustine county was called at the court-house, in the town of San Augustine, on the 20th day of December, A. D. 1849, for the purpose of petitioning the Congress of the United States to pay our meritorious mail contractor, Colonel A. Huston, the additional expense which he has incurred by carrying our mail in a *four-horse* conveyance, while his contract and pay was only for a two-horse conveyance.

The meeting was called to order, and Major W. C. Edwards was elected chairman and Colonel S. W. Blount secretary. The object of the meeting was fully and eloquently explained by Colonel J. M. Ardrey and H. M. Kinsey, esqs.; after which a committee of fifty persons was appointed to draught resolutions expressive of the sense of the meeting; the committee were Jas. M. Ardrey, H. M. Kinsey, Leroy Miller, H. H. Curl, S. Miller, Charles Stewart, Jas. B. John-

son, S. T. Burns, F. B. Dixon, F. Moore, A. E. Ashmore, B. Moore, W. C. Duffield, Joses Hobdy, John Hunt, Wilson Haile, C. Payne, John Perry, A. Horton, R. D. Wood, James Bullock, R. W. Martin, W. N. Sigler, George Blake, S. C. Watson, Gordon Needham, Thomas Hollis, O. M. Wheeler, E. B. Powell, C. Epps, &c. Said committee retired, and in a short time returned and reported through their chairman, Colonel Ardrey, the following preamble and resolutions :

Whereas we recognize the principle of responsibility in all persons engaged in public employment, and we claim for ourselves the privilege of applauding or condemning their respective acts, and we contend that public business, performed in a good and proper manner, should be amply and fully paid for by government ; and whereas our meritorious citizen, Colonel Almanzon Huston, has become sub-contractor for mail-routes Nos. 6113, 6123, 6140, 6146, to carry the mail in a two-horse coach, and in consequence of the unparalleled condition of the roads from the almost incessant rains of the last year, it became necessary to place a four-horse coach with four horses on said mail line, as it was impossible to transport the mail by the conveyance specified in the contract ; and whereas we believe that the mails would have been discontinued and the contract abandoned, to the great injury and inconvenience of the community, but for the course pursued by Colonel Huston ; and whereas we hold that no man should be required to labor for the community without an equivalent compensation, and if from miscalculation, or any other cause, an individual should be mistaken in the expenses of his undertaking, or should be from necessity compelled to increase his expenses or his labor, we hold that all such increase of labor or expense should be compensated by the government : Therefore—

Be it resolved, That our fellow-citizen, Colonel A. Huston, deserves the thanks of this community for his energy and industry in transporting the mails through our country.

Resolved, That it has been impossible for the last year to transport the mails on Colonel Huston's contract in a two-horse vehicle and with two horses, in consequence of the excessive and almost constant rains and the extreme badness of the roads.

Resolved, That the act of Colonel Huston in changing the manner of carrying the mail on his route from a *two* to a *four-horse* conveyance was an act of necessity and not of choice, and was imperiously demanded by the interest of the community.

Resolved, That it is incompatible with the dignity of our government to receive the labor and means of any one of its citizens without full and ample remuneration for the same.

Resolved, That it is impossible to transport the mail through our country in a two-horse conveyance, and that we request the Postmaster General to contract for carrying our mails hereafter in a four-horse conveyance.

Resolved, That we are entitled to the same mail facilities possessed by our sister States, and we here respectfully ask our government to grant them to us.

Resolved, That we believe the compensation on the original contract

did not fully pay the expenses of carrying the mail in a two-horse vehicle, and that the changing from a two-horse to a four-horse vehicle greatly increased the expense and labor of Colonel Huston.

Resolved, That we here respectfully solicit the Congress of our country to grant relief to Colonel Huston, and to cause him to be paid for such extra service as he has rendered to the country by changing the manner of carrying the mails on his line

Resolved, That we view this as a meritorious case, and earnestly recommend it to the consideration of Congress.

J. M. ARDREY, *Chairman*.

L. Milier, J. B. Johnson, W. C. Duffield, H. M. Kinsey, H. H. Curl, C. Epps, and others, committee.

Which said resolutions were unanimously received and adopted.

On motion of J. B. Johnson, esq., the proceedings of this meeting are requested to be published in the Red Land Herald.

On motion of Colonel Ardrey, the meeting adjourned.

W. C. EDWARDS, *Chairman*.

S. W. BLOUNT, *Secretary*.

CINCINNATI, *February 11, 1850.*

We, the undersigned, left this place on the 7th instant with six horses to the stage and fifteen bags of mail matter. We crossed the Trinity, and proceeded about one mile when we bogged down five of our horses, and with great difficulty got out, and proceeded on through the bottom; and after striking the bridge road we bogged the whole team three several times. In one instance we had to unload and pack the mail, over one hundred yards, before we could get ground to support it.

We succeeded in getting seven miles the first day. That night we had to encamp in the Pine Woods, it raining hard nearly all night. The next day we proceeded on about three miles, to Dillard's creek, and found it impassable, the bottom being covered [with water] for half a mile. We had to turn back, and found ourselves bound up by another creek. Before we reached the first house, about three and a half miles, we had to camp out with the mail a second night, within half a mile of the house, not being able to cross the creek to get to it.

The third day we got the team across by swimming the horses singly, and roping the stage over by hand, and packing the bags, to the number of fifteen, over on a log. We had two such operations on that day in going a distance of about seven miles; and on the third day, at night, arrived back at Cincinnati, having performed in three days a distance of ten miles; camped out with the mail two nights; bogged all the team several times; unloaded and swam creeks three times, and returned with the mail, not being able to proceed on the route—making a distance of ten miles, and returning in three days with six horses to the stage.

J. C. NEWCOME,

J. A. SCRUGS,

Drivers.

The above statement was sworn to and subscribed on this 11th day of February, 1850, also which fact came under my own observation.

ISAAC JOUSEY,
Notary Public, Walker county.
(County seal annexed.)

The above certificate we are requested by Colonel Huston to publish. It is accompanied by the county seal of Walker county, and is no doubt correct.

We are also informed by Colonel Huston that the mail will have to come in an *ox team* when it does come, and that the streams are now too high to look for it under two or three weeks.

Will the United States government fail to reward so faithful and persevering an agent?

We think not, and their former conduct proves it to us. If they do not reward Colonel Huston, we know not who they will reward.

CROCKETT, *February* 13, 1850.

This is to certify that I have just delivered to Colonel A. Huston, mail contractor, at Crockett, fifteen sacks of mail matter, with a six-ox team, from Cincinnati, having to unload several times on the route by bogging down. This is the same load of mail matter that left Cincinnati on the 7th with a six-horse stage, and had to return on account of the high waters and boggy state of the roads.

Z. STEADHAM.

THE STATE OF TEXAS,
County of San Augustine.

Personally came and appeared before me, the undersigned authority, Benjamin F. Benton, a resident citizen of the county and State aforesaid, to me well known, (late one of the editors of the Red Land Herald, a newspaper published in the town of San Augustine, in said county and State, during the year A. D. 1850, edited by Benjamin F. Price and Benjamin F. Benton,) who, being duly sworn according to law, declares and says that the within and foregoing is a true and correct copy of the proceedings of a certain public meeting held in said town, and of a certain certificate and affidavit, together with an editorial thereon, the first of which was published in said paper of "January 12, 1850," and the latter in that of "February 16, 1850," and both of which were republished in an "extra" of "February 23, 1850."

B. F. BENTON.

Sworn to and subscribed before me, this 19th day of September, A. D. 1857.

Certifying whereto, witness my hand and seal of the county court of
[L. s.] San Augustine county, Texas, this 19th day of September,
A. D. 1857.

F. H. DIXON,
Clerk County Court, San Augustine county, Texas.

ARGUMENT.

To the honorable judges of the Court of Claims:

May it please this honorable Court, I know that I have placed myself in a very awkward position by endeavoring to place my cause before this honorable Court while laboring under the impediments which I do. But this is not the first time that I have been placed in an awkward position. I was in a very awkward position while performing the services for which I am here seeking justice at your hands; and I here ask of the honorable Court to extend to me that degree of lenity due to a plain, common citizen, and not anticipate from me the strict formalities that should govern a practical attorney. And in summing up the case for the consideration of the Court, I shall endeavor to confine myself to the testimony now before the Court by citing such portions as are material to the case; and in the first place will quote some of the evidence which was introduced on the former trial of this case before your honors:

S. W. Blount, postmaster at San Augustine, certified to the department, under date of February 26, 1850, that the contractor was running four-horse service, and the necessity for the same; says Colonel Huston has performed the service faithfully, and should be paid extra, &c. This is concurred in by Mr. Whittlesey, postmaster at Sabine town.

Thomas P. Collins, postmaster at Crockett, certified to the department in February, 1850, that it is impossible to carry the mail in two-horse hacks, and that the contractor has been running four-horse coaches upwards of twelve months.

J. E. Wade, postmaster at Houston, certified to the department in February, 1850, to four-horse coach service, to high waters, bad roads, &c.

M. O. Dimon, postmaster at Montgomery, certified to the department in January, 1850, that the mail could not be carried in two-horse hacks; that the contractor is running four-horse service; says he is entitled to extra pay, &c.

James Coulter, postmaster at Cypress Creek, certified to the department February 2, 1850, that the contractor was running four four-horse teams between Houston and Montgomery since November, 1848, and that that grade of service was necessary and required.

Samuel Flurnoy, postmaster near Chinno, Nacogdoches county, certified to the department in February, 1850, to increase of mail matter on the route from one to five, and that the mail has been car-

ried in four-horse coaches since November 1, 1848, and that it requires seventeen four horse teams between Sabine town and the city of Houston.

W. W. Frazell, postmaster at Lockranzy, certified on the 14th of February, 1850, to the department to six four-horse teams on route 6140, and says: I do not hesitate to say he could not carry out the contracts with two-horse hacks. Says the travel is no object, and the contractor ought to be paid extra.

Ephraim Coon, postmaster at Nacogdoches, certified to the department in February, 1850, that two horses could not carry the mail, and that contractor has run four-horse stages since November, 1848. Mr. Coon's certificate is concurred in by B. Hardeman, postmaster at Melrose, Nacogdoches county.

J. C. Smith, postmaster at Huntsville, certified to the department February 6, 1850, that he has just travelled over the route, and that it is impassable for a coach; that the contractor came up last evening in person with several large bags of mail matter; that he has four four-horse teams on this route; has run them since November, 1848; says he ought to be paid extra service; says no man could have done more than the contractor.

F. Pumeroy, postmaster at Cincinnati, certified to the department February 8, 1850, that the mail could not be carried in two-horse hacks, and the mail left that office on the 7th instant with a six-horse team and fifteen bags of mail matter.

George W. Grant, former contractor, certifies that for the last twelve or fifteen months two-horse service is insufficient.

Now, may it please your honors, here is the certificates of twelve postmasters, (from one end of the line to the other,) all going to show the same facts; that is, the absolute necessity of four-horse service, and that four-horse service was actually performed by the contractor on the routes. And this evidence, thus far, is from the officers of the government, and in the Post Office Department. And can your honors for a moment doubt that this evidence is not of the highest order that could be introduced into a court of justice? Twelve sworn officers of the government—sworn to support the Constitution of the United States and the laws of their country, and to protect and perform the duties of postmasters over the different offices for which they were appointed—all testifying to the head of the department the same facts, with a unanimity unequalled in the annals of testimony.

Now, if your honors please, I will quote the testimony of some of the same gentlemen in answer to interrogatories propounded to them:

Thomas P. Collins, late postmaster at Crockett, says, in answer to interrogatories: That he carried the mail in four-horse coaches, and that large amounts of mail matter was sent over the routes during those years; his means of information was, he being postmaster at Crockett. Said Huston performed four-horse coach service to the close of his contract, and four-horse service was absolutely necessary; and says that large amounts of mail matter was sent up Red river and over these routes that ought to have been sent from New Orleans

to Galveston, thence to Weston, Texas. There was a gradual increase of mail matter during 1848, 1849, and 1850.

M. K. Snell, late postmaster at Houston, testifies, in answer to interrogatories: That the service performed was four-horse coach service; that the average amount of mail matter was from three to five bags; says his means of information was, he being postmaster at Houston in 1848 and 1849; says nothing less than four-horse service could carry the mail matter during 1848 and 1849; says portions of mail matter sent over those routes ought to have been sent over other routes. There was a continual increase of mail matter.

Ephraim Coon, late postmaster at Nacogdoches, testifies, in answer to interrogatories: That early in the summer of 1848 the service was four-horse hacks, and from November, 1848, in four-horse mail stages; says he frequently weighed the mails from said routes west of Nacogdoches—that the average per trip was 520 lbs; I weighed, at the request of the contractor, one trip, 1,370 lbs; says four-horse stage service was indispensable; an average of one hundred pounds per trip ought to have been sent over other routes.

James B. Johnson, assistant postmaster at San Augustine, testifies, in answer to interrogatories: He says, that sometimes the stage was so loaded with mail matter that it could not take a passenger, and sometimes so heavy that it had to be sent in an extra wagon; says four-horse service was absolutely necessary to transport the mail matter, and with that could not at all times keep up the mail matter due; says that a large amount sent up Red river and over said routes ought to have been sent from New Orleans to Galveston and to western Texas; also, that mail matter sent over said route should have been sent further up Red river, and that there was a large increase of mail matter on the route.

George L. Clapp, special mail agent for Texas at that time, testifies, in answer to interrogatories: Says the average amount of mail matter sacks was from three to five, and of letter bags from two to three; says his means of information was derived from being mail agent and travelling with the mails; says a considerable amount of mail matter sent over said routes ought to have gone to Galveston and to the west; he says there was a gradual increase of mail matter during those years, and he deemed four-horse coaches absolutely necessary; says he, as mail agent of the department, advised the said Huston to continue the mails in four-horse coaches, as he deemed two-horse service useless; says he told him, doubtless, the Postmaster General would allow him additional compensation.

W. B. Reaves, city recorder at Houston, testifies, in answer to interrogatories: Says he carried the mails in four horse coaches to the end of his contract.

E. S. Huston, innkeeper at Nacogdoches, and agent on the line, testifies, in answer to interrogatories: Says the average weight of the mails was from five hundred to five hundred and fifty pounds per trip, and that the service performed was four-horse coach service, and says it could not be transported with less.

This comprises the testimony that was before your honors on the

former trial of the case, except the evidences of the public meeting at San Augustine, and the petitions of three hundred citizens of Harris county, at Houston, and petitions from San Augustine and other counties, and numerous certificates from individuals, to wit: Dr. L. Randal, J. M. Rankin, and J. D. Nash, showing the great sacrifices contractor had made to carry out the service, all of which I beg your honors to notice on the present trial of the case.

The petitioner begs leave here to observe, that when he came into the service on those routes, Hon. Cave Johnson was the Postmaster General under whom these contracts were let, and as they were let without a knowledge of what service would be required, it was confidently understood that they would be increased as the necessity of the country demanded; and this was measurably carried out while Mr. Johnson remained at the head of that department; for as soon as a showing was made to the department that the horse service from Huntsville to Washington was not sufficient, Mr. Johnson immediately increased it to hack service; and had Mr. Johnson remained at the head of the Post Office Department, petitioner has no doubt but the extra service would have been granted. But Mr. Collamer coming into the office on the 4th of March, 1849, without a knowledge of the state of the Texas mails, saw proper to take a different course, although this route was the great thoroughfare in and through the State of Texas, and over it had to be transported all the mails for a large portion of the State. Sufficient service should have been placed upon it to enable the contractor to carry the whole mail through.

I will now proceed to draw your attention to the testimony taken since the reference of the case to this honorable Court by the House of Representatives for a rehearing; and in order to rebut some of the grounds assumed in the report of the committee of the House, and some of the errors contained in Mr. Campbell's letter to Hon. R. Brodhead of the Senate, I beg leave to quote the following testimony: I do not know whether your honors deem it necessary for me to notice the report of that committee, for it must appear evident to the Court that the committee in making that report did not examine one particle of the testimony upon which this Court founded its judgment, but made the report solely upon the letter of Mr. Campbell to Hon. R. Brodhead, and that letter represents only one fact that was not stated in my first petition to Congress for relief; that being, the mails having been weighed at Houston, and found to average only 166 lbs., and that contractor had been notified that increased service would not be allowed on his routes. That that was the correct weight of the mails at Houston for the east at that time, petitioner has no doubt, for the mails were then being sent up Red river, and transported over two hundred miles by petitioner, and that large amounts were thus transported that ought to have gone by the way of Galveston, thence to the west.

J. B. Johnson testifies, in answer to interrogatories. He says: I was assistant postmaster at San Augustine at the dates mentioned in this interrogatory, and did the principal business of the office the greater portion of the time. On account of the large amount of mail

matter sent up Red river, by the way of *Grand Ecore*, to this point, and by the large accumulation of mail matter at Alexander when the Red river was low, when sent forward it came in large amounts, greatly exceeding the capacity of the mail service on the routes, from Sabine town to the city of Houston, through this place. On account of the foregoing reasons, I made an application to the postmaster at New Orleans to send the mail matter for this portion of Texas by the way of Galveston and Houston, which was complied with by the postmaster at New Orleans by sending the mail matter on that route for this portion of Texas; and it so continued for quite a length of time during low water in Red river. I think the first application was made in the summer of 1849. When Red river became navigable it was partially restored to that route. Again I made a second application, and the second change by the way of Galveston, I think, took place early in 1850. He also says there were large amounts of mail matter sent up Red river, and throughout the routes in question, that should have been sent by the way of Galveston and to western Texas, and so continued for a long period of time. He says: I have known the contractor to have to procure a private team in order to get the mail forwarded to this place, there being a much larger amount than the service was able to carry forward with a good four-horse coach on the routes at the time.

This evidence I consider sufficient to satisfy the honorable Court that Houston was not the proper point to order the weighing of the mails on these routes; and this evidence, together with E. Coon's, postmaster at Nacogdoches, of the actual weight of the mails at that place from the west, which is from Houston to that place, being an average of 520 lbs., and of one mail weighing 1,370 lbs., being $40\frac{1}{2}$ lbs. more than the weight at Houston for one month, as reported by Captain Snell, postmaster at Houston. This evidence the petitioner considers sufficient to satisfy your honors that the report of Captain Snell of the weight of the mail sent over this route from Houston from April 14 to May 13 was correct, and that his testimony before the Court, saying that the average weight of the mails over the routes in question was over 400 lbs., is also correct. Thus the discrepancy in Captain Snell's testimony, referred to by Mr. Campbell, is satisfactorily explained.

General Sam Houston says, in answer to interrogatories propounded to him: I usually travelled in the stage when I could. I can form no correct estimate of the average weight and bulk of the mails; there was during the time but little travel and but few passengers, but the stage was usually well loaded with mail matter.

In answer to 9th interrogatory, he says: Less than four-horse service would have been of no use. Says he was informed by the postmaster at Crockett that the mail matter had accumulated to the amount of 41 large bags at that office, &c. This was in the autumn of 1849, and the Court will bear in mind that this was after Mr. Johnson had procured the change of the mails for eastern Texas by the way of Galveston.

In answer to 10th interrogatory, he says: The increase was very

great from the distribution of documents from Washington to different parts of the country, which had mainly to pass over these routes, and there was an annual increase of it during those years.

In answer to 11th interrogatory, he says: They were the main leading routes; and furthermore, mail matter which should have entered Texas by way of the Sabine from Grand Ecore was sent from New Orleans to Galveston, and from there to Houston, and transported to that portion of Texas lying east of the Trinity river; thus the accumulation of the great amount of mail matter at Crockett. He says he remonstrated to the department, and requested that the correction should be made at New Orleans, and that only designed for eastern Texas should be sent by way of Red river. The correction was never effectually made, as I am informed, to the present time.

In answer to 12th interrogatory, in relation to the extent of country supplied with mail matter over these routes, he says: I would suppose, not having the means of correct knowledge, about 160 by 200 miles north and south, and 160 east and west.

In answer to 13th interrogatory, he says: In relation to four-horse service from two-horse hacks, it certainly was indispensable, (the change, I mean,) if it was necessary to carry any mails at all on the routes in question.

In answer to the 15th interrogatory, he says: I made repeated applications to the department to increase (them) the service, and I did not fail to encourage the contractor on the routes to risk something in extending his business, from a conviction that the government, when in possession of the facts, would not withhold a fair remuneration for the increased service, and this was done from a knowledge of the necessity of the country at the time.

In answer to the 16th interrogatory, he says: I am satisfied I was never informed that the increased service would not be sanctioned.

In answer to 17th interrogatory, he says: From my recollection of the stands and distances and number of teams on the routes, as shown in the foregoing interrogatory, I believe the schedule represents them fairly and correctly.

In answer to 18th and last interrogatory, he says: I do know that the service could not have been performed without great labor and expense.

S. W. Blount, postmaster at San Augustine, testifies, in answer to 7th interrogatory propounded to him: That sometimes the mails were very heavy; I have no idea what the average weight would have been; sometimes they were very bulky. Said they were carried in four-horse coaches; don't know the time commenced, but he continued it after commencing to end of his contract.

In answer to 9th interrogatory, he says: I deemed four-horse coach service absolutely necessary in transporting the mail over said route.

In answer to 10th interrogatory, he says: There was a considerable increase, but I do not know the average weight and bulk; and on some occasions the mail matter was left over at this office on account of weight and bulk. Says this route was the main leading route through eastern Texas; says a large portion of eastern Texas was supplied

with mail matter brought over the routes in question; says, again, the four-horse service was absolutely necessary.

In answer to 12th interrogatory, asking whether he, as postmaster at that place, had not, by request of petitioner, informed the Postmaster General that petitioner was running four-horse service, and its necessity, he says: I think I did so inform the Postmaster General; I have no knowledge of his answering the letter; I have no knowledge of ever receiving any letter from him (the Postmaster General) on that subject.

In answer to 15th interrogatory, he says: I was postmaster at San Augustine during the years 1848, 1849, and 1850. I do not recollect of ever receiving any order from the Post Office Department to weigh the mails on those routes.

In answer to 16th interrogatory, he says: I recollect being secretary of a public meeting on that business, and I would refer to the publication of the proceedings of said meeting, &c. He says the said Huston was at great expense, and used great energy to keep it up.

A. E. Baker, merchant at San Augustine, says, in answer to 7th interrogatory: During the winter and spring the mails over the routes in question were large and bulky; I cannot now estimate the weight, but at times it was very bulky and apparently heavy. My means of information was from personal observation. Says the service performed was four-horse service. Early in the summer of 1848 he put on four-horse service from Sabine town to Nacogdoches; says he continued four-horse service to the end of his contracts. He says: From my knowledge of the bulk and weight of the mails over the routes of which the said Huston carried the mails during those years, I do not believe it could have been transported with less than four-horse service; says the mails sent over the routes in question during the years 1848, 1849, and 1850, could not have been transported with two-horse hack service; that the change from two to four-horse service was absolutely necessary. I know that the said Huston used great energy and perseverance in carrying the mails over said routes.

J. Pinckney Henderson, ex-governor of Texas, testifies, in answer to 7th interrogatory propounded to him, and says: During the winter and spring of those years, while Congress was in session, the mails over the routes in question were very heavy, but the average amount per trip I cannot now estimate.

In answer to 8th interrogatory, he says: The service performed by the said Huston on the routes during those years was four-horse service. The time he put on the four-horse service I cannot now recollect.

In answer to 9th interrogatory, he says: I do not believe it could have been transported with less than four-horse service. As a general thing there was a large bulk of mail matter on the routes of which the said Huston was contractor. The route in question was the main leading route from eastern to western Texas.

In answer to 13th interrogatory, he says: If it were necessary to transport the mail matter over the routes of which the said Huston was contractor during those years, it was absolutely necessary to

substitute four-horse service in lieu of two-horse hack service. Says said Huston used great energy in carrying out the said contracts.

H. M. Kinsey, attorney-at-law at San Augustine, testifies, in answer to 8th interrogatory: That some time in 1848 he put four-horse service on the routes, and continued the same to the end of his contracts; says I am very confident that during the fall, winter, and spring of those years that nothing less than four-horse service could have carried the mails over said routes; says that after annexation there was a large increase of mail matter on the routes of which the said Huston was contractor. The route was the main leading route through eastern to western Texas, and has been so since the first settlement of the country. Says he deemed four-horse service absolutely necessary, from the fact that without four-horse service we would have been the greater part of the time without mails.

In answer to the 14th and last interrogatory, he says: I know of no other matter relative to the claim in question, save that it is my opinion that but few men in Texas, except Huston, would have carried out the contracts.

Mr. Benjamin F. Benton, clerk of the district court of San Augustine county, in answer to 7th interrogatory, says: I was frequently about the post office during those years; there was frequently a half dozen sacks of newspapers, pamphlets, books, and periodicals, besides the letter and way-mails. When the mails were delayed for any length of time, as many as ten large sacks of mail matter would accumulate at the office; says this was particularly the case at Cincinnati, on the Trinity river. I should suppose the average weight of the large sacks of paper mail was about 100 pounds each, and the large sacks of letter mail 150 pounds.

In answer to 8th interrogatory, says: Two-horse coaches might have been sufficient to have transported the mails a part of the season, but for perfect celerity, winter and summer, four-horse coaches were absolutely necessary; says I doubt whether a six-horse coach could have transported the mails that accumulated in high water.

In answer to 9th interrogatory, says: There was always more mail matter during the session of the United States Congress than at any other time. There has been a gradual increase of mail matter on the routes since annexation, and particularly since the reduction of letter postage from ten to five cents for unpaid, and to three cents for pre-paid letters. The increase of the mail matter was also caused by the increased business of the country. Said I should suppose that portion of the State supplied by Col. Huston's mail line contained about ten or fifteen thousand voters; I speak of the years 1848, 1849, and 1850.

F. H. Dixon, clerk of the county court of San Augustine county, in answer to 8th interrogatory, says: I deemed four-horse service absolutely necessary to transport the mail matter that passed through this place, (I mean San Augustine, Texas;) nor do I think anything less than four-horse service could have transported the mail matter that was sent through this place to various parts of Texas during the years 1848, 1849, and 1850. He said the number of inhabitants in Texas in 1850 was, by a reference to the census, 212,560 and upwards.

The majority of this population resided east of the Trinity river, I think, and the routes in question supplied that majority with mail matter. Says I was advised not to travel by the stage on this route; I procured a horse, and found it difficult to get through on horseback.

After quoting the foregoing testimony, may it please this honorable Court, allow me to state that no notice was ever given to contractor that the service would not be accepted and that he would not be paid for the same, for General Houston tells you that although he made frequent applications to the department he never was notified that the increased service would not be sanctioned, and that the contractor would not be remunerated for the same. And S. W. Blount, postmaster at San Augustine, gave the department official notice that four-horse service was being performed, and of the necessity thereof, and the department did not notify that it would not be sanctioned.

And here allow me to remark, that through the postmaster at San Augustine (the residence of the contractor) was the proper and legal channel for the department to have given the contractor notice. Suppose you wish to give notice to a man that has trespassed upon your lands, would you write a letter and send it through the post office, or would you reduce it to writing and have it legally served upon him by the proper officer of the government?

Your honors must be aware of the great uncertainty of a notice given through the post office; and I need only refer your honors to papers sent to this Court in this case that have not come to hand, to wit: the testimony of J. M. Ardry, esq., late of San Augustine, Texas, and of Calaway Deen, merchant at the same place; and that petitioner has sent to the commissioner that took the testimony for certified copies of their evidence, which I beg your honors to notice should it arrive in due time; also, that papers do get mislaid and are lost sometimes, after being on file in the Court; for instance, those papers referred to which were on the former trial of this case, to wit: the written statement of Hon. Sam Houston, Thomas J. Rusk, and A. H. Evans, which are not now among the papers of the case.

That the letter of the tenth of June, referred to in Mr. Campbell's letter, was written after receiving the report of Capt. Snell, postmaster at Houston, the petitioner does not doubt; but immediately upon the eve of that, such information was received at the department from General Houston, under date of 18th June, 1849, which satisfied the department that the notice should not, in justice to the contractor, have been given, and was probably withheld; at any rate, it is evident, from the facts and history of the case, that the Hon. Mr. Collamer, the Postmaster General at the time, did not think it just to the contractor to send that letter or notice to Congress, together with the papers and evidence of the case.

This case was first presented to the Hon. Jacob Collamer, Postmaster General, by Messrs. Houston, Rusk, and Kaufman, in person; and petitioner was at the same time introduced to the Postmaster General. He took the case under consideration and came to this conclusion: That, inasmuch as the petitions from the citizens of Texas were more particularly addressed to Congress than to the Postmaster Gen-

eral, and as he did not conceive that he had the power, under the regulations of the Post Office Department, to grant the relief prayed for, he was satisfied, from the facts set forth in the petitions and resolutions of the public meeting at San Augustine, and the representations of Hon. Sam Houston, T. J. Rusk, and D. S. Kaufman, that the service was required; and upon our agreeing to refer it to Congress, he expressed himself much pleased with the manner petitioner was performing the service, and seemed to have no doubt but that Congress would grant the necessary relief, and said he would send the papers in the case to Congress, which he did. And in doing so, it is reasonable to suppose he sent up at that time—then having the case fresh before him—all the papers that should, in justice to either party, have been sent to Congress. And it was in consequence of this just and good feeling, so expressed by the Postmaster General at that time, which induced Messrs. Houston and Rusk to form a bill in the Senate, which passed that body, requiring the Postmaster General to settle with the petitioner for the extra services he had performed on his contracts, upon the principles of law and equity, and to pay him for the extra services he had performed. Thus this matter stood previous to its first reference to the honorable Court of Claims.

The first ground assumed by the petitioner in his brief now before the Court is, that he claims nothing from the government but that which he is justly entitled to receive. His claim is not one of an ordinary mail contract, but grew out of a state of facts and circumstances which, perhaps, may never again arise under the government. The late republic of Texas voluntarily merged her political existence into that of the American confederacy upon no other considerations and stipulations than those of her sister States—that is, to be placed upon the same footing, and have guaranteed and awarded to her all the benefits and privileges of her sister States. Then, was the government of the United States bound in good faith to grant to the citizens of Texas mail facilities sufficient to transport her mails? Most clearly so. Texas having ceased to be a national government, and becoming one of the States of the Union, it devolved upon the United States government then to supply the place of her nationality. She having just arisen out of a long revolution, which had cost her blood and treasure, consequently her facilities for extending her mail-routes were limited, and her postal arrangements on a very small scale; and it then became the duty of the Post Office Department of the United States to see that the citizens of Texas were properly supplied with mails. Here is a vast country, stretching from the Sabine to the Rio Grande, and from the Gulf of Mexico to the Pacific, with a population over 200,000 inhabitants, including a vast territory large enough to make four or five States in size, on an average, of the other States in the Union, which came suddenly into this Union without first having been under a territorial government of the United States, and at a time just after the mail lettings of the southern section of the States; and there having been no provisions made for her mails, consequently the Postmaster General contracted for the mails on these routes for the service of the postal arrangements of the late

republic of Texas, and let the routes in question for two-horse hack service. But, in consequence of the great change which followed the annexation of Texas to this government, it did not, and could not, remain and prove sufficient, for Mr. Coon, postmaster at Nacogdoches, testifies that the average weight of the mails from west of that place was 520 pounds per trip, and one trip weighed by him weighed 1,370 pounds. Mr. E. S. Huston, innkeeper at Nacogdoches, testifies (being agent on the routes) that the average weight of the mails, per trip, was from 500 to 550 pounds. Mr. Clapp, special mail agent, testifies that the average amount of mail matter was from three to five sacks of paper mail and from two to three bags of letter mail. Mr. Benton, clerk of the district court of San Augustine county, testifies that there were often as many as half a dozen sacks of paper, periodical, and book mail, besides the letter and way-mails. S. W. Blount, postmaster at San Augustine, testifies that the mails were very heavy and bulky, and at times had to lie over at that office on account of weight and bulk. Mr. Johnson, deputy postmaster at the same place, testifies that the mails were large and weighty, and at times had to lie over at that office on account of weight and bulk; he has known the contractor to have to send the mails forward in a private wagon when running a good four-horse team, and has known him to refuse to take any passengers on account of the weight and bulk of the mails. Mr. Snell, postmaster at Houston, testifies that the weight of the mails over the routes in question, from Houston, was 400 pounds per trip. Mr. Frizzell, postmaster at Lockranzy, Mr. Pomoroy, postmaster at Cincinnati, Mr. Coulter, postmaster at Spring Creek, Mr. Dimon, postmaster at Montgomery, Mr. Smith, postmaster at Huntsville, Mr. Flurnoy, postmaster at Chireno, and Mr. Harde-man, postmaster at Melrose, all concur in the weight and bulk of the mails, and of the absolute necessity of four-horse service for the exclusive transportation of the mails on the routes. All of the above-named witnesses concur in their testimony in relation to the extreme high waters and bad state of the roads during those years. Mr. Benton, in his testimony, goes more minutely into a historical description of the route, and gives a full and clear history of the route from one end to the other.

James W. Scott, present mail agent for Texas, in answer to interrogatories, testifies, in answer to 7th interrogatory, asking the weight of the mails on the route, he says: I do not know. They now are all under contract and require four-horse coaches. He commenced service in two-horse hacks, and raised it to four-horse coaches. I was agent for Tarbox & Brown part of the time. I know, or believe, that, from the state of the roads and the accumulation of the mails, the celerity of transportation required four-horse coaches, or service equal to it. The mails were continually increasing in weight. The franking privilege, as used by the member of Congress of the eastern district, must have largely increased the weight.

In answer to 11th interrogatory, whether or not these were the main leading routes from eastern to western Texas, he reverses the question, and says: They were then, as now, the principal routes

from the coast to eastern Texas, receiving their supply of western mail at Huntsville.

In answer to 12th interrogatory, asking the extent of country supplied, says: I cannot answer precisely. This route now feeds the counties of Montgomery, Walker, a part of Grimes, a part of Polk, Trinity, and Tyler, and the counties of Houston and Nacogdoches—in fact, all the counties bordering on the lower Trinity and what is known as eastern Texas, save and except some of the extreme lower and the upper counties of the Trinity and the coast.

In answer to the last interrogatory, says: I only know that the service was an arduous one, running over bad roads with water-courses unbridged.

Then, may it please your honors, allow me to observe, that from Mr. Scott's testimony you see that the mail from the coast, or Houston, to the east, received its western mail at Huntsville, showing clearly that Houston was the last place on those routes to have ordered the weighing of the mails, in order to ascertain its weight on the routes generally; for without a mail from New Orleans, by way of Galveston, no mail matter left Houston for the east on these routes, except the small amount from the citizens of Galveston and Houston. Mr. Scott says these routes received their western mail at Huntsville. Then Huntsville would have been the proper place to have ordered the weighing of the mails at the west, and San Augustine or Nacogdoches at the east; and during the time the mail was being weighed at Houston it only contained the mail matter of the city of Galveston and Houston; for at that time the States' mail (as we called it) was being sent up Red river and over petitioner's routes to the west, as is clearly shown by the testimony of Mr. Johnson.

The honorable Court, in making up its decision in this case, on its former trial before this Court, say they have no other criterion to be governed by except Mr. Grant's certificate, saying that he run the line from San Augustine to the city of Houston, at a time when the roads were extremely good, with sixteen horses, and that it would necessarily require double that number for the four-horse service, as run by the petitioner. The Court should have been shown by the attorney in the case that Mr. Grant ran on a schedule of seven days' time, and that petitioner ran on a schedule of five days' time, the speed of the route having been increased from seven to five days. On a schedule of seven days, with light hacks and good roads, one team could travel thirty-five or forty miles and make their time; whereas on a five days' schedule, with four-horse post coaches, from twelve to fifteen miles is heavy service; and there was documentary evidence on file and then before the Court sufficient to show seventy-odd horses then on the routes; for Mr. Coulter's certificate shows four four-horse teams on route No. 6113—Houston to Montgomery; and Mr. Smith's certificate shows four four-horse teams on route No. 6146—Montgomery to Crockett; and Mr. Frizzell's certificate shows six four-horse teams on that route No. 6140—from San Augustine to Crockett; and Mr. Flurnoy certifies that it required seventeen four-horse teams from between Sabine town and the city of Houston.

These, together with the horses on the Washington line, make eighteen four-horse teams, or seventy-two horses. It would seem that the Court did not take that portion of the line from Sabine town to San Augustine into consideration. That portion of the line required two teams, being twenty-eight miles of line. And I will here remark, that the average distance to the team, as run by the petitioner, was a fraction over fifteen miles, which is extreme heavy service for four-horse post coach teams, they being usually run from ten to twelve miles. Does not the testimony therefore clearly show to the honorable Court the absolute necessity for four-horse coach service on these routes; and does it not show that petitioner has performed the four-horse coach service on the routes? And does it not as clearly show that this was not an act of unauthorized assumption on the part of petitioner, but one of absolute necessity, compelling him to substitute four-horse service, in lieu of two-horse hack service, in order to get the mails through? A contract for any specific service does not necessarily compel a contractor to carry the whole mail on a route should it greatly exceed the grade of the specified service. For instance, a horse mail could not be compelled to carry the service of a two-horse hack, nor a two-horse hack the service of a four-horse coach. There is only one grade of service that necessarily compels a contractor to carry all the mail matter on his route, should it greatly exceed all other grades of service, and that is called a "star" contract, where the contractor undertakes, for a specified sum, to carry the whole mail with due celerity, certainty, and security. And the testimony clearly shows that after the annexation of Texas to the Union a channel of communication to her was opened from thirty-odd States which had previously been measurably closed, but was now thrown open; and the postal arrangements of the United States having been on a more liberal scale than those of Texas, it consequently sent a large amount of mail matter forward, to find its way into Texas either by the way of Red river, and over these routes, or by the way of Galveston and Houston. And the testimony in the case clearly shows the manner of its entry into Texas, and that it was all either sent up Red river or all sent by the way of Galveston, when it should have been assorted at New Orleans; and the mails for the eastern counties bordering on the Sabine river should have been sent up Red river; and the mails for the western counties bordering on the Trinity, and for western Texas, should have gone by the way of Galveston and to the west without touching these routes; but, instead of this, petitioner transported the western mail that was sent up Red river over his lines, a distance of over two hundred miles, as is clearly shown by the testimony. Then is petitioner justly entitled to a just remuneration for the extra services he has performed. Mr. Campbell's letter to Hon. R. Brodhead cites the change of the contract from Huston & Brooks to Huston, to take effect January 1, 1849. This change is clearly shown to have been one of necessity on the part of petitioner, in order to secure himself against the dead weight of his partner, Brooks, and that the petitioner was the only responsible party to the government.

Mr. Dixon's testimony says: Brooks was an unsafe partner in any business, &c., and the letters from the Post Office Department, marked F, G, showed that he had long been trying to get Brooks off his hands at the time the change was made; and when the petitioner took the contracts upon himself the postmasters on the routes and the members of Congress from Texas were endeavoring to convince the Post Office Department of the necessity of an increase of service, and that four-horse service was then obliged to be run to carry the mails through on the routes. Petitioner might have continued two-horse hack service, and refused to take any more mail matter than a just amount for that grade of service; but that would have created an unpleasant state of things, and proved ruinous to the mail interest of the country. But instead of doing so, petitioner took the authority of the highest officials of the country, and carried out the contracts for the benefit of the government and the citizens, and in so doing has performed a large amount of extra services of which the government have been the recipients of the increased revenue arising therefrom, and she cannot upon any principle of honor or justice refuse to make a fair remuneration for the same. So soon as petitioner received the result of the former decision of the case by this honorable Court he came immediately on to Washington, to endeavor to get a rehearing in the case, in order to be able to show the actual increase of service on the contracts. This he urged to be done so soon as it came up for action before Congress.

Allow me here to remark, by way of reference, that this is not the first case of implied responsibility which I have performed for my country. I had the honor of commanding the 7th regiment of Michigan militia in 1831 and 1832, and when the Black Hawk war broke out on the western frontier the Indian agent at Chicago made a requisition upon me for two hundred volunteers to defend that place against the attack of the Indians; and in fitting out that campaign, which I did with the shortest despatch, it became necessary for me to involve myself to a considerable amount. I think the United States mail was then being carried from White Pigeon Prairie through to Chicago once in two weeks on horseback, and it became necessary for me to place a relay of horses on the road, in order to forward the expresses through from one post to another. I did not have to await the action of Congress on this case of implied responsibility, but it was promptly paid by the proper officer of the government upon the bare certificate of an officer of a higher grade. Then I had some reason, when I undertook to perform this service with a full knowledge of (as General Houston says) the necessities of the country at the time, that it would be promptly met. General Houston tells you in his testimony that he appointed me quartermaster general of Texas in 1835; and in sustaining the army in Texas it became necessary for me to perform a large amount of implied responsibility, and I have never shrank from any responsibility for the benefit of my country whenever I have been placed in a position which required my action, but have always carried out all my public undertakings to meet the demands and necessities of my country, and in so doing I have never

been actuated with a speculative motive, but by a laudable spirit of patriotism. And could a government like ours fortify itself better, cheaper, or more securely than by making it the interest of every citizen to sustain her whenever a crisis should arise requiring their action? This has ever been my doctrine, and I have always acted up to it in good faith; and wherever I have been placed in a position when the necessities of the country have imperatively demanded, I have always acted up to it. Then, was the position which I am here placed in one which the necessities of the country did imperatively demand action?

From the large amount of testimony introduced in the case, and from the character of that testimony, your honors must come to the conclusion that it was, and that it was absolutely necessary for me to increase the service on those routes, and that I did so with a full knowledge of the necessities of the country before me; for General Houston testifies that he advised me to do so with a knowledge of the necessities of the country at the time, and that he did not hesitate to believe that I would receive a fair remuneration for the same so soon as the government were in possession of the facts. Here is a statement of the facts as they existed at that time:

I was performing a mail service from Sabine town to San Augustine, 28 miles; thence to Crockett, 96 miles; thence to Huntsville, 45 miles; thence to Washington, 54 miles, being 223 miles of western line, and from Huntsville to Houston, on the coast, (as Mr. Scott calls it,) 87 miles. And Mr. Scott, the present mail agent of the department, testifies that the mail from the coast, or Houston, received its western mail at Huntsville. This shows plainly, then, that when the mails were being sent up Red river that I transported the entire western mail from Sabine town to Washington, 223 miles, when, in fact, I should not have transported one pound of it; and from the commencement of the great increase of mail matter on those routes, which the testimony shows to be in 1848, I transported the principal mail matter from thirty-odd States of this Union for western Texas through on these lines to Washington, 223 miles. In many instances it was continued from Huntsville to Houston, making the distance 250 miles. Mr. Johnson's testimony shows that those mails were thus transported until the summer of 1849, when he obtained a partial change by the way of Galveston. His testimony also shows that when the change was made I then had the entire eastern mail from those States to transport from Houston to the east, two hundred and fifty-odd miles. Mr. Johnson tells you that the mails from New Orleans were restored to Red river again so soon as Red river became navigable; and he afterwards procured a second change by the way of Galveston, which took effect early in 1850. Thus, for the want of a proper knowledge on the part of the postmaster at New Orleans, the mails for Texas were all either sent by the way of Red river, or all by the way of Galveston. Some time in 1850 Mr. Clapp, then mail agent of the department, furnished the postmaster at New Orleans with the names of the counties bordering on the Sabine and east, directing that postmaster to divide the Texas mails at that place, and to send that por-

tion for the eastern counties by the way of Red river, and for the western by the way of Galveston; and General Houston testifies that the correction has not properly been made to this time, as he is informed. Then, from this statement of the facts in the case, there cannot be a doubt of the imperative necessity of an increase of service on those routes. Then the next question arises, Did the petitioner increase that service? And on this question it is only necessary to refer your honors to the testimony of all the witnesses in the case—some twenty-odd. They all agree and testify to the fact; some of them testify that early in the summer of 1848 he placed four-horse service on the routes from Sabine town to Nacogdoches, and so on to Huntsville; and they all agree in saying that from November 1, 1848, four-horse coach service was performed by petitioner to the close of his contract. This testimony shows that the great increase of the mail matter was first on the routes from Sabine town to the city of Houston, by the mails then being sent up Red river, and that petitioner placed four-horse service on that end of the route the 1st of July, on to Huntsville, and completed it through to Houston on the 1st of November, 1848, having run four-horse service two years on about half the line, and one year and eight months on the other half. Then, did the Post Office Department know that petitioner was performing that service? Most clearly so; for Messrs. Houston, Rusk, and Kaufman, then members of Congress from Texas, made the representation to the department, asking an increase of service on the routes, first in 1848, then in 1849. General Houston again pressed the question, under date of 18th of June, 1849, from Nacogdoches; and S. W. Blount, postmaster at San Augustine, at the special request of petitioner, informed the department that four-horse service was being performed by the contractor on those routes, and of its absolute necessity; Mr. Whittlesey, postmaster at Sabine town, concurring in the same, and the certificates of twelve postmasters, from one end of the line to the other, all testifying to the same fact that four-horse service was being performed, and of the necessity for the same. And the petition of three hundred citizens of Harris county, at Houston, and the petitions of citizens of other counties, all representing the same facts, and the resolutions of the public meeting held at San Augustine, were all before the Post Office Department, as is clearly shown from the fact that all of this evidence in the case was sent from the Post Office Department to Congress by Hon. J. Collamer, then Postmaster General; and the petitioner never was informed that the service would not be sanctioned, and only that the department did not, under the regulations of that office, see or conceive that it had the power to grant the relief asked. And as the petitions from the citizens of Texas were more directly addressed to Congress than to the Postmaster General, he therefore recommended a reference of the case to Congress; said he would send the papers up, which he did. Then, that the service was accepted by the government there can be no doubt, and that the government were the recipients of the increased revenue arising from the same service,

which in law and equity makes an acceptance of the implied responsibility or service.

Confine this case within the strictest rules that the committee of the House of Representatives, in their opinion, think all cases of implied responsibility with the government should be confined, and it is a case which entitles the petitioner to the relief he asks.

It cannot well be conceived how a stronger case of implied responsibility could be made out; for General Henderson says, in his testimony, if it were necessary to transport the mails at all on those routes, it was absolutely necessary to substitute four-horse service in lieu of two-horse hacks. General Houston tells you the same, almost in the same words. This is the testimony of the two senators of Texas on that point.

The testimony of twelve postmasters on the route shows the same facts, as well as all the other testimony in the case—some twenty-odd witnesses of the highest standing; and as this case grew out of a train of circumstances which never did, nor in all probability never will, govern any other case under this government, unless, for instance, the republic of Mexico should be annexed to this Union on the same footing which Texas was, and then the Post Office Department undertake to carry the United States mail from its terminus on the Gulf to the city of Mexico in a two-horse hack; for this route was the great leading one from the thirty-odd States, through eastern to western Texas; and when that mail entered Texas by the way of Red river, the petitioner transported the great mail of Texas over two hundred and twenty miles towards the capital of the late republic and the capital of the State; and the mail that entered Texas at that time by this route now finds its way into that country by a route leading from the mouth of Red river through by Burr's Ferry, on the Sabine river; another from Alexandria, on Red river, to Sabine town, on the Sabine river; another from Grand Ecore, on Red river, to the same point; another from Shreveport to Marshall, by the way of Waco, on the Brazos, then to Austin, the capital; and from the coast a mail now enters Texas at Sabine Pass; and another at Galveston, and on to Austin; another at Indianola, and a route leading on to Austin, and another at Brazos Santiago; being four entries on the coast (as Mr. Scott terms it) and four points on Red river, and another route now crosses Red river from Washington, in Arkansas, through to Clarksville, Texas, so on to the capital of the State. So that there is now nine regular mail lines into Texas, to supply the same extent of country that was supplied by the route from Grand Ecore, on Red river, and over the routes in question during the time the Texas mails were sent up Red river; and all those nine leading routes are now four-horse coach service, and now being advertised for daily service, at a cost probably of not less than \$200,000; and your petitioner supplied the same mails to the country, during the period that the States' mail was sent up Red river, for the sum of \$6,925. The great increase of the mails at and since that time must clearly satisfy your honors that petitioner had something to do on those routes at the

time for which he claims extra pay, and that he is justly entitled to a fair remuneration for those extra services.

The committee of the House of Representatives express great fear that the 30,000 postmasters and agents would assume the responsibility of the Postmaster General and bankrupt the department. How does the Postmaster General receive his knowledge, guiding him in the discharge of his duties, unless he acquires it through the postmasters' agents, and citizens of the country where service is required? And the change which took place in the Post Office Department in March, 1849, necessarily found the new incumbent not in possession of a general knowledge of those routes, and when he became properly informed on the subject, these extra services had been performed upwards of twelve months; and then, under the regulations of the department, he thought best to refer the case to the Congress of the United States. Then is the government bound in good faith to pay the petitioner a fair and just sum for his services rendered and moneys expended for the government and people; for in a government like ours the people are the sovereigns, and, consequently, the government. Then I may say that the government have accepted the services, through their sovereigns, the people; for the citizens of Texas have accepted the services, and have petitioned their agents at the head of the government to make to the petitioner a fair remuneration for those services. And the next question that arises is, what is a fair remuneration for the extra services as performed by the petitioner? This honorable Court, in their former decision in this cause, have defined the position to be that the petitioner is entitled to pay according to the increased service on the contract; and as the claimant has assumed in his brief in the case that the law governing the case had already been defined and settled by the Court, the petitioner therefore cites your honors to the law, and here begs leave to quote from your former decision the law governing the case:

"That the United States may be liable upon an implied contract appears from the first section of the act constituting this Court, by which jurisdiction is given the Court to hear and determine all claims founded 'upon any contract, express or implied, with the government of the United States.' What the law looks to, in the case of an implied contract, is not the agreement of the parties, but their circumstances or acts; and from these circumstances or acts the law raises the duty, and implies the promise, by which the party will be bound. In the case of an express contract, the law measures the extent of each party's duty by the terms to which he has expressly agreed. In the case of an implied contract, the terms are such as reason and justice dictate in the particular case, and which, therefore, the law presumes that every man undertakes to perform.—(Chitty on Contracts, 18; Hosmer, C. J., 4 Conn. Rep., 524.) In the case of *Abbott vs. Harmon*, (7 Greenl., 118,) it was held that where one accepts, or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay a reasonable compensation for them. In this case Mr. Justice Shepley said: 'When one person performs services for the benefit, and with the

knowledge and *tacit consent* of another, the law implies a promise to pay a reasonable compensation for them.' That was a case where a school-house was built under a contract with persons assuming to act as a district committee, but who had no authority; yet a district school was afterwards kept in it by the direction of the school agent. This was held to be an acceptance of the house on the part of the district, binding the inhabitants to pay a reasonable value of the building. Upon the same ground is the decision in the case of *Lamb vs. Bunce*, 4 M. & S., 275. A surgeon attended a parish pauper, with the knowledge of the overseer of the parish, and it was held that the fact of the overseer *knowing of* and *not repudiating* the surgeon's attendance, was equivalent to a request. It is stated in 1 Parsons on Contracts, 540, 542, as one of the principles to be deduced from authorities generally, and from the reason of the case, that where the changes in a contract necessarily imply an increased price, and the employer expressly authorizes, or silently, but with full knowledge, assents to them, he is then bound to pay for them.

"That the services alleged were rendered by the claimant; that they were necessary to be performed; that the department knew that they were rendered, and made no objection to them, are facts which we find to be proved by the evidence; and we are also of opinion that the claimant is entitled to compensation from the United States.

"The question then arises as to the mode of ascertaining the value of his services.

"The 23d section of the act of July 2, 1836, (5 Stat. at Large, 85,) points out the duties of the Postmaster General in relation to advertising for contracts, and prescribes limits to his power of making additional compensation for services. Among other things, it provides that 'when any extra service shall be ordered, the amount of the allowance thereof in dollars and cents shall be signified in the order for such service, and be forthwith entered upon the books of the Post Office Department; and no additional compensation shall be paid for any extra regular service rendered before the issuing of such order, entry, or memorandum whatever, on which any action of the department is to be had, allowance made, or money paid; and every contract, paper, or obligation drawn up in said office by any officer thereof, shall have affixed to it its true date.'

"The object of this provision was to impose a check upon the exercise of the discretionary power of the Postmaster General, by requiring that everything relative to his action upon the subject of extra allowances should be recorded where it might be inspected, so that when the public money should be expended, nothing relating to its expenditure should be left unexplained or uncertain. The section does not provide, either in its letter or its spirit, that no claim should be valid against the United States unless an order for additional service had been made by the Postmaster General. It was very proper to limit and check the discretion of that officer, and that was a sufficient reason for the provision. It was unnecessary to do anything more, for Congress reserved the subject of implied contracts, and had not then conferred the power of investigating them upon any

tribunal. It cannot be supposed that the framers of the act looked forward to a period twenty years distant, when this Court should be constituted, and intended to provide that although the Court should have jurisdiction of implied contracts, a claim of this kind should not be valid without a special order from the Postmaster General.

“It is to be noticed, also, that this section, after the various restrictions alluded to have been stated, contains a proviso that ‘the Postmaster General may make temporary contracts until a regular letting can take place.’ The contract in which the claimant had an interest expired on the 30th of June, 1850, and the contracts for the new service went into operation on 1st July, 1850. If the Postmaster General might make temporary express contracts, the United States may then be bound by the obligation of an implied contract, proved in such a way as is recognized by the rules of law to be binding upon individuals.

“But there is another provision in this section which states the rule of compensation in explicit terms, and which does not appear to be subject to any modifications. It is provided that ‘no additional compensation shall be made to any mail contractor, so as that the compensation for additional regular service shall exceed the exact proportion which the original compensation bears to the original services stipulated to be performed.’ The principle of this rule is adopted as the correct one in 1 Parsons on Contracts, 542. In remarking on changes in a contract, which necessarily imply an increased price, and which are assented to by the employer, the author says: ‘The question may then arise, whether he is to pay for them according to the usual rate of charging for such work, with no reference to the contract, or whether he must pay only according to the rate of contract. Some cases hold the former, but we think the better practice and the better reason in favor of the latter.’

“It appears from a certificate by George W. Grant, the claimant’s predecessor in the contract, and under whom the claimant performed the service, which comes to us from the Post Office Department, through the House of Representatives, that from the 1st of July, 1847, to the 1st of February, 1848—the roads at that time being uncommonly good—he transported the mail from San Augustine to Houston in two-horse coaches, with sixteen horses. As the claimant put upon the line four-horse coaches, he would require thirty-two horses, or double the number used by Grant, a fair compensation for which would be, according to the statute rule, double the sum paid under the original contract. He transported the mail one year and eight months, for which he was paid at the rate of \$6,894 per year, or \$11,490 for the whole period. And the same sum, in addition to what he has received, he is now entitled to recover of the United States, and we report a bill accordingly.”

Then, as the Court founded their decision upon Mr. Grant’s certificate, and without any light upon the subject as to the increase of service, assumed that it would require double that number of horses; and the Court will here bear in mind that Mr. Grant’s certificate only covered the ground from San Augustine to Houston, and not

from Sabine town to Houston. And petitioner will here remark, that when he first commenced the service on the routes he placed on and ran twenty horses from Sabine town to Houston, while running two-horse hack service, and, as the Court now sees from the testimony before them, increased it to seventy-two horses; and the cost of the increase of a change of coaches from two-horse hacks to four-horse post coaches was still greater, by substituting coaches, costing from three hundred and fifty to five hundred dollars, in lieu of hacks costing from one hundred to one hundred and fifty dollars, besides a heavy increase of expense on the harness.

Petitioner begs leave here to state that, in asking Congress for relief, he wrote out his own petition, asking no specific amount, but to be paid for the extra services he had performed for the country. And the Senate of the United States framed a bill, which passed that body, requiring the Postmaster General to settle with him upon the principles of law and equity, and to pay him for the extra services which he had performed. But when the matter was referred to this honorable Court Mr. Evans forwarded a copy of the petition to petitioner for verification; he remonstrated against the petition, as the sum specified did not more than half cover the ground of the expenses incurred by him. He informed him that he wished to have the petition verified in the shape it was in; that he could and would so amend it as to cover the necessary amount. He subsequently amended the petition by leave of the honorable Court, but the sum specified in the amended petition does not cover the amount of the actual expenses incurred by petitioner. And he would refer your honors to the petition first presented to the Congress of the United States by the petitioner, showing that the petitioner only asked for such sum as he was justly entitled to for the extra services he had rendered the government. And your honors can see clearly from the testimony before you that the increase of the service was from twenty to seventy-two horses, and that fifteen miles to the team is long and heavy service for four-horse coach teams, and that nothing less than seventy-two horses could perform the service. And in making up your decision in this case petitioner hopes and trusts your honors will take all the just and equitable grounds of the case into consideration, and grant him such relief as the nature of the case, in all its bearings in justice and equity, demands. And when the case is again reported by this honorable Court to Congress for its affirmation, he hopes and trusts he will not be told that it cannot pass the House of Representatives without a sum of money sufficient to fee two or three influentials in that House. If he is, he will, as he always has done, trust to the honesty of the representatives of his country to see that justice is done to one of her citizens.

ALMANZON HUSTON.

CONCLUDING ARGUMENT.

IN THE COURT OF CLAIMS.

ALMANZON HUSTON *vs.* THE UNITED STATES.

The attorneys having agreed to submit this case upon the facts without oral argument, and the plaintiff having filed his printed argument on the case on the 8th of November last, since which time the Solicitor has asked from the Post Office Department additional evidence, and as I find the only evidence relied upon to operate against the claim is the ordering of the weighing of the mails at the city of Houston, I have thought proper to explain more fully and clearly the situation of Houston, as it is not upon the main eastern and western lines leading from Red river to Austin and western Texas. And in order more clearly to show to the Court the true situation of the line, I here submit a sketch of Cordova's late map of Texas, from which it will be seen that Houston lies 87 miles south southeast of that line from Huntsville, where it leaves the main western line and runs south southeast 87 miles to Houston, and the main western line continues on direct to Austin by way of Washington, where it intersects the western line from Houston to Austin. And the testimony shows that the only mail weighed at Houston was the mail leaving that place for the east, and not the mail from the east to Houston, which came through from Red river; and when the States' mail (as we called it) came up Red river no mail matter left Houston for the east but the Galveston and Houston city mails; and when the State mails were sent by the way of Galveston from New Orleans it was divided at Houston, and the western mails went direct from Houston on to Austin, intersecting the main line from eastern Texas to western, at Washington. There is also a side line coming down from the upper Trinity, through the counties of Dallas, Navarro, Limestone, Freestone, and Anderson counties, by the way of Palestine to Crockett, where it intersects this main eastern and western line from Red river on to Austin. And it would have been as proper to have ordered the weighing of the mails at Palestine as at Houston, in order to ascertain their increase upon the main line from eastern to western Texas. I have contemplated the course taken by the Solicitor in my previous argument, and have endeavored to place the case before the honorable Court upon its true merits. And with these few additional remarks by way of explanation as to the true position of the line and the weighing of the mails, your honors will also see that the mails that were weighed at Nacogdoches by Mr. Coon, postmaster at that place, were only the mails from Houston and the west, and not the great (States') mails sent up Red river and through to the west on this line. From the fact that the most of that mail did not pass through the post office at Nacogdoches, being put up for western Texas, and not opened until arriving at the place directed to at New Orleans; and the evidence clearly shows that the mails were doubly large going west than they were

coming east from the west or Houston. I now beg leave to submit the case, asking of the Court as early a report as can reasonably be granted.

ALMANZON HUSTON,
Plaintiff.

IN THE COURT OF CLAIMS.—No. —.

ALMANZON HUSTON *vs.* THE UNITED STATES.

Solicitor's Brief.

This case is resisted by the United States upon the grounds hereinafter stated, to wit:

1st. The petitioner does not make out such a claim as will authorize this Court to afford the relief prayed. The contract now given in evidence shows that the petitioner contracted to carry the mail of the United States on 'the routes therein specified in two-horse post coaches. This contract does not specify or call for any particular weight of mail, or from what offices the mail to be carried is to come or is to go, but requires the contractor to carry all mail sent on said routes, even to the exclusion of passengers, within the limits of two-horse post coach service, and that limit has not been exceeded.

2d. If the petitioner rests his demand on the allegation that extra service has been performed, then the right to recover on such allegation is resolved on two grounds:

First, there was no extra service performed; the contract does not stipulate for any weight of mail below two-horse post coach service, or for the carriage of any mail usually coming from or going to particular offices, or carried over particular routes; then the suggestion in the evidence that extra mail matter carried on those routes is unfounded.

The United States have a right to the entire capacity of the vehicle contracted for, and the evidence does not show that that capacity has been exceeded. The Second Assistant Postmaster General, in a letter of the 23d January, 1858, addressed to the assistant Solicitor of this Court, states as follows:

The department cannot account for the discrepancy in the weight of the mails made by the report of M. K. Snell, the postmaster at Houston, Texas—being at one time 400 pounds and at another time only 166 pounds—excepting on the last named occasion it was required by the department, with a view to such action as might be necessary, and on the former given to the contractor *ex parte*. I will, however, state that if the average weight of the mails had been 400 pounds it would not have been sufficient to justify any action for a change in the mode of service, as 500 pounds is the *minimum* weight required for two-horse coach service.

3d. But assuming, for the sake of argument, that the petitioner did perform extra service, still he has no legal claim against the United States, because said service was performed in violation of existing acts of Congress and in the face of the declaration of the Post Office Department that no allowance would be made therefor.

The 43d section of the act of the 3d of March, 1825, (4 S. L., p. 114,) forbids any allowance over the amount stipulated in the contract, unless additional service be required.

The 23d section of the act of July, 1836, (5 S. L., p. 8,) forbids the allowance of additional compensation, except in exact proportion to the original service and compensation, and forbids any extra allowance for increased speed unless additional stock and carriers are rendered necessary; and when any extra service shall be ordered the amount of the allowance therefor in dollars and cents shall be signified in the order for such service and be forthwith entered upon the books of the Post Office Department, and no additional compensation shall be paid for any extra regular service rendered before issuing of such order and the making of such entry; and every order, entry, or memorandum whatever, on which any action of the department is to be had, allowance made, or money paid, and every contract, paper or obligation drawn up in said office, by any officer thereof, shall have affixed to it its true date, and every paper relating to contracts or allowances filed in said office shall have the date of its filing endorsed thereon.

Under these provisions of the law and the contract in this case, the Postmaster General is forbidden to make an allowance for additional service, unless more than two-horse post coach service be performed, and in such case said allowance must be preceded by the required orders; and the petitioner, therefore, can certainly raise no implied contract to pay him more without showing that he performed more than two-horse post service, and in the way designated by said acts of Congress, or subverting the legislation of Congress.

The proviso in the 23d section of the act of 1836, authorizing the Postmaster General to make temporary contracts until a regular letting can take place, does not apply to this case. It was intended to prevent the interruption of the mail service by authorizing the Postmaster General to make temporary contracts where contractors under the regular lettings failed to enter upon their contracts at the time stipulated; or where an established mail-route was not bid for at the regular lettings, and it became necessary for public convenience, in the meantime, for the Postmaster General to enter into a temporary contract, and to continue the same, until a permanent contract could be made in the regular way. If this is not the true interpretation of this proviso, then the act in reference to extra allowance would seem to have no meaning.

4th. If the petitioner did perform extra service, still he cannot recover, because he acted voluntarily, and in the face of a declaration of the Post Office Department that no allowance could or would be made therefor. In the letter already referred to, the Second Assistant Postmaster General says, in speaking of the petitioner's claim: I have

to inform you (Assistant Solicitor) that the change in mode of service from two-horse coaches to four-horse coaches in certain routes in Texas, for which Mr. A. Huston claims from November, 1848, to 30th June, 1850, was not ordered by the department, because there is no power under the law to do so without readvertising the routes, which was not done, inasmuch as it was not necessary.

The letter of the Postmaster General (Campbell) of the 24th of May, 1856, and addressed to the chairman of the Committee on Claims of the Senate, gives a full statement of the facts in this case, and clearly shows that the department repudiated the claim here set up by the petitioner. The application of the petitioner to increase his service from two-horse post coaches to four-horse coaches, was refused by the department, as will clearly appear from the facts stated in said letter.

Now this demand is made to depend upon an implied promise to pay, and it is not denied that the United States may be liable upon such an undertaking under proper circumstances, but this is not such a case. Here the acts of Congress referred to interpose to prevent such implication, and the government can only be bound in accordance with their provisions.

It is denied, however, that the law will imply a promise to pay where there is an express declaration of a party that he will not be bound, or where there is an express agreement.—(See Chitty on Contracts, p. 18, note; *Whitney vs. Sullivan*, 7 Mass., 107; *Worthen vs. Stephens*, 4 Mass., 448; *Neston vs. Davis*, 24 Main., 374.)

The decision formerly made by this Court in favor of the petitioner proceeded upon the idea that extra services had been performed, and that the Post Office Department made no objection thereto. It now, however, appearing, from a new state of facts, that an objection was made, the authorities cited by the Court in support of its opinion are relied upon by the United States in resisting the petitioner's demand.

D. RATCLIFFE,

Assistant Solicitor of the Court of Claims.

COURT OF CLAIMS.

ALMANZON HUSTON *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the Court.

The petitioner, under the contracts set forth in his petition, was contractor from November 1, 1848, to July 30, 1850, for carrying the mails from Sabine town, through San Augustine, Nacogdoches, Crockett, and Huntsville, to Houston, and from Huntsville to Washington, *in two-horse coaches*, semi-weekly, for the sum of \$6,894 per year.

The petitioner alleges that, from the bad condition of the roads and the increase of mail matter, the two-horse coaches specified in the

contract became insufficient for the service, and that therefore he "placed on the entire route *four-horse post coach service* on the first day of November, 1848, and continued it to the 30th day of June, 1850, when his contract expired;" that this additional service was absolutely necessary, and was made known to the Postmaster General, and not objected to by him, and that the benefit of it accrued to the United States; and he claims an allowance for this additional service upon the ground of an implied contract therefor.

The deponents for the petitioner prove that four-horse coach service was rendered, but they do not fix with precision when it began or when it was extended over the whole route; their general statement is, that such service was rendered "*during 1848 and 1849.*"

Ephraim Coon testifies, answer 3d: The said petitioner, Huston, carried the United States mails, during the years 1848 and 1849, from the town of Sabine to the town of Huntsville, and, I think, to the city of Houston, in Texas, from at least as early as the summer of 1848, in four-horse post hacks, and from the fall of 1848 in four-horse mail stages.—(*Ibid.* answer to 7th interrogatory.)

Amaziah Baker testifies, answer to 8th interrogatory: The service performed by the said Huston on the routes in question was four-horse service. Early in the summer of 1848 he put on four-horse service from Sabine town to Nacogdoches; at what time he completed putting on four-horse service to the city of Houston I cannot say.

J. Pinckney Henderson testifies, answer to 8th interrogatory: I do not know at what time in the year 1848 he put four-horse service on the road; but on this part of the line he had four-horse service on the line in the summer of 1848.

In the letter of the petitioner to the department, dated July 5, 1849, exhibit A, he says: "I run the entire lines the first nine months without a failure with but two-horse service, and the two last quarters has been run with four-horse service." This evidence from the petitioner places the beginning of the four-horse service at January 1, 1849. And the petition of the citizens of Houston to "the House of Representatives, or the Postmaster General," (exhibit B,) which is dated January 1, 1850, says: "That he first carried the said mail in a two-horse vehicle, but that he has carried the said mail *for about one year*, and still carries it, in a four-horse conveyance with four horses." The burden of proof is on the petitioner; and giving every part of the evidence its due weight, the beginning of the four-horse service is not positively proved to have been before January 1, 1849. All the testimony show that such service was continued to the end of the contract, July 1, 1850.

The deponents for the petitioner prove that the roads of the route were in bad condition, and in places, at certain times, almost impassable; that the streams were high, and the river bottoms overflowed; that these results had followed from unusual quantities of rain in 1849 and 1850. And the petitioner, in his letter, cited before, of June 5, 1848, exhibit A, writes thus: "And it is not in the power of man to avoid failures in one of our southern rainy seasons." The general result of the evidence is expressed in General Houston's answer to

the 5th interrogatory addressed to him as to the state of the roads "during the years 1848, 1849, and 1850, to the end of the contract." He testifies that "in the summer and fall of the year they were tolerably good; in the winter and spring they were, at times, impassable in anything like regular travelling, and I would suppose as bad as roads could be in a country like ours."

Benjamin F. Benton, whose testimony upon the condition of the roads and the causes of it is the most minute, in his answer to the 8th interrogatory testifies: "A two-horse coach might have been sufficient to have transported the mails for a portion of the season, but for perfect certainty, winter and summer, a four-horse coach was absolutely necessary. I doubt whether six horses could have transported the mails that accumulated during high water."

It is observable that in the petition of the claimant to Congress, dated April, 1850, and sworn to December 31, 1850, he does not refer to the condition of the roads as a reason for increasing the service, but specifies the increase of mail matter as the only cause for his so doing. He states: "Immediately on finding it was indispensable to place extra service on the line, and all out of the great increase of mail matter, I informed the Post Office Department," &c. And in his statement appended to that petition he says: "And from the great increase of the mail matter I was compelled to place a full and complete line of four-horse coaches upon the line or abandon the contract."

All the deponents concur in the increase of mail matter from the summer of 1848 to July 1, 1850, but few of them furnish any means by which the average weight of the mail matter can be determined.

George L. Clapp testifies, answer to 9th interrogatory: "The average amount of mail matter per trip was from three to five sacks, and from two to three leather pouches; and my means of information are, that I was mail agent, and frequently travelled with the mails."

Martin K. Snell testifies, answer 7th: "The mail carried by the said Huston averaged per trip from three to five mail bags, weighing an average in all of four hundred pounds. My means of information are, that I was postmaster at the city of Houston during 1848 and part of 1849.

Ephraim Coon testifies, in answer to 6th interrogatory: "I do not recollect what was about the average amount of mail matter on the routes for which the said petitioner, Huston, was contractor in 1848, but between the spring 1849 and spring of 1850 I frequently weighed the mail matter from said routes west of the town of Nacogdoches, and found the average per trip to have been 520 lbs. I was postmaster, and weighed the mails at the request of the contractor, and found one trip where the mail matter weighed thirteen hundred and seventy pounds. I do not recollect the weight of the mail matter east of Nacogdoches."

And in his answer to the 10th interrogatory he testifies: "During the year 1849 there was more than twice as much mail matter carried over the routes for which said petitioner, Huston, was contractor as there was in 1848. And there was continual gradual increase from

1849 to the close of said contract. I suppose the average per month of such increase from the beginning of 1848 to June, 1850, would be some nine or ten per cent."

Emery J. Huston, in his answer to the 6th interrogatory, testifies: "I think that the amount of mail matter carried on the routes for which said petitioner, Huston, was contractor, during the years 1848 and 1849 would average per trip, most part of three years, five hundred or five hundred and fifty pounds; and my means of information are, that I was agent on the line of said routes."

Benjamin F. Benton, in his answer to the 7th interrogatory, testifies: "I was frequently about the post office during those years, (1848, 1849, and 1850;) there were frequently half a dozen sacks of newspapers, pamphlets, books, periodicals, &c., &c., besides the letter and way mails. When the mails were detained for any length of time, as many as ten large sacks of mail matter would sometimes accumulate at an office. I should suppose the average weight of the large sacks of paper mail was about 100 lbs. each, and that of the large sacks of letter mails 150 lbs."

It appears from the letter of Postmaster General Campbell, dated May 24, 1856, that by a report, dated May 15, 1849, made to the department by Martin K. Snell, the average weight of the mail sent on the routes to San Augustine from April 14 to May 13, both days inclusive, was 166 pounds and a fraction for each trip. It is claimed by the petitioner that the discrepancy between the report and the testimony of Martin K. Snell is accounted for, *first*, by the fact that for the report to the department the mails were weighed by Mr. Snell only at Houston, while the western mail came on to the routes at Huntsville, and could not be included in the weighing at Houston; whereas Mr. Snell in his deposition testifies as to the average weight of the mail *over the routes*, including the western mail received on to the routes at Huntsville.—(Petitioner's printed argument, p. 13.) And, *secondly*, by the testimony of J. B. Johnson, that "*in the summer of 1849*" mail matter had been diverted from the routes of the petitioner and sent by the way of Galveston because of low water in Red river.—(Printed argument for the petitioner, pages 5 and 6.)

It also appeared from the deponents for the petitioner that occasionally mail matter which should have been sent to Galveston was carried over his route, and they all concur in the opinion that, from the state of the roads and the quantity of mail matter, four-horse coach service was necessary for the performance of the work. The earliest reports of failures by the petitioner made to the department are dated in March, 1850, and in them it is stated that the causes assigned for the failures at the time, by the drivers, were, that some of their horses had died, and that the stages were out of repair. The causes assigned for the failures in the reports dated in April and May are, that the waters were so high they could not be crossed with the stage. But the letters of the petitioner to the department, dated, respectively, July 5, 1849, and September 12, 1849, (exhibits —,) refer to fines imposed on him previous to those dates, for failures,

and attributes these failures to the nature of the country through which the routes run and "high times of water."

It appears from the letter of the Postmaster General, (Campbell,) dated 15th March, 1856, that the contracts "for the new service, which went into operation 1st July, 1850, (when the contracts of the petitioner expired,) covering the same ground, and by the same points, tri-weekly," the price was \$19,590. The letter states, "you will perceive that the former service is *twice* a week in *two-horse* coaches; the latter *three times* a week, *four-horse* coaches, and under contracts at different annual lettings."

It appears by the deposition of Martin K. Snell, (7th interrogatory and answer,) that the average weight of mail matter "on the routes of which said Huston was contractor" was "all of four hundred pounds." By the answer 6th of Emory J. Huston, that it would average 500 to 550 pounds per trip most part of 1848 and 1849 for the routes. By the deposition of Ephraim Coon, (answer to interrogatory 6th,) that the average amount of mail matter from the routes *west* of Nacogdoches was "520 pounds." It does not appear that either of these amounts, except the last, was ascertained by actually weighing the mail matter.

In his petition to Congress, dated April, 1850, the petitioner states "that he became sole owner of the line 1st November, 1848;" "that on becoming owner, &c., I found that I must abandon the contract, or place a full and complete line on it of four-horse coaches;" "that immediately on finding it indispensable to place extra service on the line, &c., I informed the Post Office Department, and asked for a corresponding increase of service." These statements represent the first application to the department for the increase of service, for which the allowance is claimed to have been made soon after November 1, 1848.

But the letter of Postmaster General Campbell of May 24, 1846, shows that the first application for such increase of service was received on the 10th of March, 1849, through Messrs. Houston and Kauffman, and the letter states, in reference to such application, as follows: "This was immediately answered by stating that no additional pay could be allowed for such improvement unless absolutely required by the size and weight of the mails, and that instructions would be forwarded to weigh the mails each trip for four weeks."

And the same letter subsequently states: "Nothing whatever appears to have been said of the necessity of four-horse coaches on account of the weight of the mails until in March, 1849."

The letter also states as follows: "On the 15th May a letter was received from the contractor, (A. Huston,) stating that he had been running four-horse coaches, and was about withdrawing some of his teams, but concluded to continue until he could hear from the department."

On the 10th June he was answered that no additional expense on his route could be incurred.

On the 12th July application for improving the service was received by Hon. S. Houston, (under date Nacogdoches, June 18, 1849.) On

4th August he was informed that the Postmaster General declined ordering the proposed improvement, because the average weight of the mail was shown to be only 166 pounds.

It is shown by the letter from the Post Office Department, dated November 3, 1848, (exhibit Z,) "that the department makes no contracts for the conveyance of any 'specific quantity of mail matter' by any mode of conveyance used. Contractors are expected to carry all the mail that may be presented within the capacity of the vehicle stipulated for, but no precise amount or bulk is or can be prescribed."

The testimony tended to show that the "passenger travel" upon the routes was limited.

James B. Johnson testified, (answer 7th :) "Sometimes the stage was so loaded with mail matter that it could not take a passenger;" and Samuel Houston testified, (answer 7th:) "I usually travelled in the stage when I could. I can form no correct estimate of the average weight and bulk of the mails; there were but few passengers, but the stage was usually well loaded with mail matter."

On all the evidence we find that the petitioner carried the mail over all his route in four-horse coaches, from at least as early as the 1st January, 1849, to July 1, 1850, and that, from the bad condition of the roads and the increase of mail matter, the service could not have been performed by two-horse coaches in the winters and springs of that period.

The contract which the petitioner alleges is an implied contract for additional service in carrying the mail, and an allowance therefor made with the Postmaster General as the agent of the United States.

The testimony disproves such a contract. The letter of Postmaster General Campbell, dated March 26, 1856, and brought into the case since it was last heard here, proves that the petitioner's applications for four-horse service were refused as often as, and as soon as, they were made. The petitioner was free to use four-horse coaches if it was his pleasure for any reason so to do; that matter was not within the control of the department, and its mere knowledge of it, therefore, was not its adoption of it; and the express and reiterated refusal of the department to authorize or pay for such increase of service excludes any contract for it on the part of the United States. The implied contract alleged, therefore, is not shown, and the effect of such a contract does not come into consideration.

We are of opinion the petitioner is not entitled to relief.

DR. GEORGE YATES—HEIRS OF.

JANUARY 18, 1859.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HEIRS OF GEORGE YATES *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. Letter from Auditor of Treasury, in answer to the order of the Court; also letter from the same to Deputy Solicitor, transmitted to House of Representatives.
3. Claimants' brief transmitted to House of Representatives.
4. Deputy Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the
[L. S.] seal of said Court, at Washington, this 17th day of January,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA,
County of Washington.

The petition of the heirs of Doctor George Yates, deceased, late a surgeon's mate in the continental line of Virginia during the war of the revolution, respectfully sheweth unto your honors:

That the government of the United States is justly indebted to them in the sum of \$2,400, with interest at six per cent. per annum on the same from November 4, 1783, till paid.

For that whereas, heretofore, to wit, during the revolutionary war, the said Doctor George Yates was a surgeon in hospital department of

the American army, and "continued in said service to the end of the war," as is shown by the public records now on file in the executive department of the government at Washington; that their said ancestor, the said George Yates, was regularly commissioned as a "surgeon's mate," and as such discharged and performed all the duties of hospital surgeon to the end of the war.

Petitioners would represent, that by a resolve of Congress, dated October 21, 1780, giving to "all officers who continued in service to the end of the war half pay for life," the said George Yates was entitled to receive the same. And further, that by a resolve of Congress, dated January 17, 1781, the officers of the "hospital department and medical staff," in lieu of half-pay for life, became entitled to receive the "half-pay of a captain;" and further, that by the resolve of March 22, 1783, "all the officers belonging to the hospital department," who were entitled to half-pay by the resolution of January 17, 1781, became entitled to receive "five years' full pay in money, or securities on *interest* at six per cent. per annum, as Congress shall find most convenient, instead of the half-pay for life promised by the resolution of October 21, 1780;" and the said George Yates having agreed to accept the said five years' full pay, in manner and form as provided for in said resolution of March 22, 1783, in lieu of his half-pay for life, the government of the United States thereby became bound in law and equity to pay to the said George Yates the said five years' full pay of a captain, to wit, \$40 per month, or \$2,400 for the said term of five years, with interest thereon from November 4, 1783, till paid.

But your petitioners represent that the said government of the United States failed and refused to pay the said sum and interest, or any part thereof, to the said George Yates in his lifetime, and hath refused and still doth fail and refuse to pay the same, or any part thereof, to your petitioners as his heirs-at-law, to their damage twenty thousand dollars.

Your petitioners memorialized the Congress of the United States, and at the second session of the 25th Congress the Committee on Revolutionary Claims in the House of Representatives reported a bill for their relief, (see report 854, and bill 772;) and at the 3d session of the 27th Congress a joint resolution was submitted for their relief, which was reported on, but no further action had.—(See resolution 138, report 257, 3d session, 27th Congress.) On January 9, 1844, the memorial of your petitioners was again submitted to the Senate of the United States, and referred to the Committee on Revolutionary Claims. Said committee reported adversely, January 25, and the memorial was recommitted, with additional documents. On February 13, 1844, there was another adverse report, and the report was ordered to lie on the table.

Such was the action of the Congress of the United States on the claim of your petitioners; but in the case of Maria Stevenson, widow of Doctor George Stevenson, of Pennsylvania, a similar case in every respect to that of your petitioners, the Committee on Revolutionary Claims in the Senate, the 13th day of February last, made the following report, with the accompanying bill:

In the Senate of the United States, February 13, 1855.—(Ordered to be printed.)

Mr. Evans made the following report: (To accompany bill S. 647.)

The Committee on Revolutionary Claims, to whom was referred the petition of Maria Stevenson, praying to be allowed the commutation pay to which her husband was entitled for services as a surgeon's mate in the general hospital during the revolutionary war, report:

That there is no doubt that the husband of the petitioner, George Stevenson, was a surgeon's mate, and served to the end of the war. The *strict* construction put on the resolution of January 17, 1781, by the officers of the government, prevented him from receiving his commutation when other officers were settled with. Within the last *twenty* years, however, a more liberal construction has prevailed. Both branches of Congress have at different times passed bills providing for this class of officers, although only one is known to have become a law: the case of John Knight, approved June 15, 1832.—(See the report of the committee of House of Representatives on the case of Samuel Y. Keene; Revolutionary Claims, 462.)

The committee think this liberal construction *is the true one*, and report a bill for the relief of the petitioner.

S. 647.—*In the Senate of the United States, February 13, 1855.*

Mr. Evans, from the Committee on Revolutionary Claims, submitted a report, (No. 514,) accompanied by the following bill; which was read, and passed to a second reading.

A BILL for the relief of Maria Stevenson, widow of George Stevenson, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, required to pay, out of any money in the treasury not otherwise appropriated, to Maria Stevenson, widow of George Stevenson, deceased, five years' full pay of surgeon's mate in the continental line of the army of the revolution, being the full amount of the sum due to the said George Stevenson, deceased, for commutation of half-pay as surgeon's mate in the Pennsylvania continental line of the revolutionary army: *Provided*, That the said sum shall be received in full of all demands against the government.

The said report of the Senate states that "both Houses have at different times passed bills providing for this class of officers, although only *one* is known to have become a law: the case of John Knight, approved June 15, 1832." In addition to this case, your petitioners would cite, as illustrative of the legislative interpretation of the resolve of Congress of January 17, 1781, the following cases allowed by Congress as embraced within the strict letter of the said resolution, viz: Dr. Samuel J. Axson, of South Carolina, surgeon's mate—see U. S. Statutes at Large, vol. 6, p. 494; Dr. Joseph Prescott, of South Carolina, surgeon's mate—*Ib.*, p. 732; Dr. Wm. Cogswell, of Massachusetts, surgeon's mate—*Ib.*, p. 718; and the case of Dr. Joseph

Savage, of Virginia, surgeon's mate, passed on the 2d day of March, 1855. In this last cited case the committee say, "that by every principle of right and equity *the case is within the strict letter of the resolve of Congress.*"

Petitioners would further represent unto your honors, that they are solely interested in said claim, and became thus interested as the heirs-at-law of the said George Yates, deceased; and after due proceedings had in the premises, they pray your honorable court to frame and report to the United States Congress a bill for their relief, appropriating to their use and benefit the sum of two thousand four hundred dollars, with legal interest thereon from the 4th day of November, 1783, till paid. And as in duty bound, your petitioners will ever pray, &c.

ALEXANDER H. EVANS,
Attorney for the Claimants.

STATE OF VIRGINIA,
County of Alexandria.

Personally appeared before the undersigned authority, a justice of the peace in and for the county aforesaid, Reuben Zimmerman, one of the heirs-at-law of Doctor George Yates, who, after being duly sworn, says that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

R. ZIMMERMAN.

Subscribed and sworn to this the 17th day of August, 1855.

C. F. SUTTLE, J. P.

TREASURY DEPARTMENT,
Third Auditor's Office, October 16, 1857.

SIR: I have received your letter of the 15th instant, in which you state, that in a report of the 26th March, 1856, from this office to the Secretary of the Treasury, it is stated that Dr. George Yates was a surgeon's mate in the line of Virginia in the revolution; and you add that it is meant by this that he was a regimental and not a hospital mate, and if so, you request me to say in what regiment he served. I have accordingly to inform you that I have no knowledge of the regiment to which he belonged, nor have I the means, in the absence of the rolls, which were turned over to the Commissioner of Pensions by this office in 1836, to ascertain. Whether he was regimental surgeon's mate or hospital surgeon's mate, it would not, according to the resolve of the 17th January, 1781, affect his claim to commutation, as neither regimental nor hospital surgeons' mates are designated therein as entitled to half-pay.

Respectfully, your obedient servant,

ROBT. J. ATKINSON,
Auditor.

JOHN D. MCPHERSON, Esq.,
*Deputy Solicitor Court of Claims,
Washington City, D. C.*

TREASURY DEPARTMENT,
Third Auditor's Office, March 28, 1856.

SIR: I have the honor to acknowledge the receipt of the letter of the chief clerk of the Court of Claims, enclosing a certified copy of an order of the Court asking certain information in relation to the case of Dr. George Yates, of the revolutionary army, and propounding the following, upon which you request a report from me:

1st. What grade of service was performed by Dr. George Yates in the Virginia continental line in the army of the revolution.

2d. In what the service of a surgeon's mate differed in fact from those of hospital physicians and surgeons.

3d. Whether Dr. George Yates served to the end of the revolution.

I have, accordingly, to inform you that Dr. George Yates served as a surgeon's mate in the Virginia continental line of the army of the revolution.

The only difference between the duties of hospital physicians and surgeons and surgeons' mates appears to have been in extent, the latter's duties being of a similar character, but more limited. Dr. Yates does not appear to have served to the end of the war, his name only appearing on the revolutionary records in this office to the 31st December, 1782, up to which time he was settled with. He appears to have received bounty land as a supernumerary officer. Surgeons' mates have never been considered entitled to commutation; but officers of the army who became supernumerary subsequent to the 1st January, 1781, did not lose their right thereto. The papers are herewith returned.

With great respect, your obedient servant,

ROBT. J. ATKINSON, *Auditor.*

Hon. JEFFERSON DAVIS,
Secretary of War.

HEIRS OF DOCTOR GEORGE YATES vs. THE UNITED STATES.

At the term of the Court (October 15, 1857,) at which this case was argued and submitted, the attorney for the claimants asked and obtained the permission of the Court to amend his petition in this: to represent Doctor George Yates a surgeon's mate in "the continental line of Virginia," and not in the hospital department; and the fact was proven by the production of two land patents from the government to the heirs of the said George Yates, for his revolutionary services as surgeon's mate in "*the continental line of Virginia.*"

The Third Auditor of the Treasury also says: "I have, accordingly, to inform you that Doctor George Yates served as a surgeon's mate in the Virginia continental line of the army of the revolution." Doctor Yates did not serve to the end of the war, but was a supernumerary, and entitled to commutation so far as *service* was concerned. This point is not in dispute. The only question is, "Was Doctor Yates entitled to commutation for services as *surgeon's mate in the Virginia*

continental line of the army of the revolution?" The heirs have long since received their bounty land for this service. The only claim is for commutation.

The Solicitor, in his brief, says: "Only in the resolution of October 21, 1780, was half-pay given, and it was given to *officers* only. Were the surgeons and surgeons' mates *officers* within the meaning of this resolution?"

This question is fairly and clearly stated by the Solicitor, and is really the whole question to be determined by this Court, if it has not already been settled.—(See *Baird vs. United States*.)

In this case Chief Justice Gilchrist says: "Whether this corps constituted a part of the army, so as to entitle the surgeon, (or surgeons' mate,) upon its reduction, to half-pay for life, is a point to be determined by an examination in which it was considered by the legislative authority at the time, and into the language of the resolution upon the subject."

The Solicitor, in his brief, says: "It is true that surgeons and surgeons' mates are styled *officers* in the resolution of September 30, 1780, organizing their department." This resolution specifies the pay of the director, chief physicians, and surgeons, of the hospitals, surgeons' mates in hospitals, and *surgeons' mates in the army*.

Chief Justice Gilchrist, in the case cited, says: "We think it cannot be denied that Doctor Baird was an *officer*, and the resolution of October 21, 1780, provides that the 'officers reduced' shall be entitled to half-pay for life." This decision of the Court fully answers the inquiry propounded by the Solicitor when he asks, "Were the surgeons and surgeons' mates officers within the meaning of this resolution?" Judge Gilchrist thinks no one can deny it.

It then follows, as a necessary consequence, if Dr. Yates was an *officer* in the Virginia continental line of the army of the revolution, he became entitled to half-pay under the resolution of October 21, 1780, and to commutation under the resolution of March 22, 1783, which offered commutation to ALL officers entitled to half-pay. The argument of the Solicitor relative to the establishment of the "hospital department," by resolution of January 17, 1781, can have no bearing whatever on the case of Dr. Yates, as he was not a part of that establishment, but belonged to the "continental line of Virginia."

The Solicitor, in his brief, says, that "the evidence shows only that he was a surgeon's mate, without distinguishing whether he was in the hospital department or in a regiment." On reviewing the evidence he frankly admits that it is proven Dr. Yates was in the continental line, and, therefore, could not have been in the hospital department, as the terms are contradictory. A *hospital* officer could not belong to the *line*.

The statute of limitations is never regarded by Congress in these cases, and was agreed by the Solicitor that the Court should decide upon the merits of this claim.

On the question of interest, I refer again to the case of Dr. Baird, where the subject is fully investigated.

A. H. EVANS,
Attorney for Yates' heirs.

IN THE COURT OF CLAIMS.—No. 183.

HEIRS OF DR. GEORGE YATES *vs.* THE UNITED STATES.*Solicitor's Brief.*

This is a claim for the commutation granted to officers of the revolutionary army by resolution of March 22, 1783.—(4 Journals, 178.)

1. *Yates was not entitled to the benefits of that resolution.* It promised commutation only to such medical officers as were entitled to half-pay by the resolution of January 17, 1781.—(3 Journals, 569.) Yates was only a surgeon's mate, and surgeons' mates were not provided for in the resolution of 1781. Yates, therefore, not being entitled to half-pay by the resolution of 1781, was not entitled to commutation under the resolution of 1783.

It is true, however, that the resolution of March 22, 1783, offered commutation to all "officers" entitled to half-pay under the resolution of October 21, 1780, and that surgeons' mates are mentioned in the latter resolution as part of the regiments. We contend, nevertheless, that the medical officers were not entitled to half-pay under this resolution.

In the year 1780 Congress was engaged in the work of remodeling the army. On the 15th of July (3 Journals, 488) they arranged the quartermaster department; on the 30th of September, (*id.*, 526,) the medical and hospital department; on the 3d and 21st of October, (*id.*, 532, 538,) the regiments or line of the army; on the 30th of November, (*id.*, 521,) the commissary department. Only in the resolution of October 21, 1780, was half-pay given, and it was given to the "officers" only. Were the surgeons and surgeons' mates *officers* within the meaning of this resolution?

It is true that surgeons and mates are styled *officers* in the resolution of September 30, 1780, organizing their department, and by that description are distinguished from "other persons employed in any of the hospitals." By that description, too, they received pay and bounty land under the same resolution. But in the resolution of October 21, 1780, the word, we contend, was used in a different sense.

It is historically known that the half-pay establishment was adopted by Congress upon the urgent solicitation of General Washington.

In January, 1788, Washington urged the measure upon Congress, (see his letter, printed in a foot note, 4 Journals, 211,) and Congress granted half-pay for seven years by resolution of May 15, 1778, (2 Journals, 554,) limiting the grant to "military officers." This grant was continued by resolution of October 3, 1780, reorganizing the line, using, however, the descriptive term of "officers," there being none other than military officers named in the resolution. This resolution of October 3 was passed, subject to the approval of the commander-in-chief. In a communication to Congress, dated October 11, 1780, (printed in a foot note, 4 Journals, 212,) Washington recommended, among other modifications of the resolution of

October 3, 1780, that the grant of half-pay should be extended for life. This was done by the resolution of October 21, 1780. It nowhere appears that it was the design of Congress, in the resolutions of October 3 and 21, to embrace new classes of officers. This, however, was done by subsequent resolutions—to general officers, by resolution of November 28, 1780, (3 Journals, 551;) to medical officers, by resolution of January 17, 1781, (id., 569,) and to chaplains, by resolution of May 8, 1781, (id., 617.)

The resolution of January 17, 1781, extending the grant of half-pay to medical officers, is stated in the preamble to have been passed upon consideration of a letter from General Washington, dated November 5, 1780. A copy of that communication is filed in this case. It there appears that the hospital surgeons chose to consider the resolution of October 21, 1780, as giving the regimental surgeons half-pay; and thereupon they claimed the same provision. General Washington doubted, and asked the directions of Congress, which were given in the resolution of January 17, 1781. This resolution ignores all claim under the resolution of October 21, 1780, and makes an original grant of half-pay to all medical officers. These proceedings upon the subject clearly show “the manner in which it was considered by the legislative authority at the time.”

We contend that, upon a view of all these resolutions, being *in pari materia*, that of October 21, 1780, should not be construed to embrace surgeons' mates in the promise of half-pay.

Baird's case, decided by this Court, is cited in opposition to this view; but it is in our favor. Baird was allowed by this Court half-pay under the resolution of January 17, 1781, *i. e.*, the half-pay of a captain, \$240 per annum. Had he been allowed half-pay under the resolution of October 21, 1780, he would have been entitled to half his own pay, which was \$65 per month, and his allowance would have been \$390, instead of \$240 per annum. Moreover, when it was objected that the resolution of October 21, 1780, embraced only military officers, this Court said that, however that might be, Baird was a regimental surgeon within the description of the resolution of January 17, 1781.

But if regimental surgeons' mates were entitled to the benefits of the resolution of October 21, 1780, it is not proved that Yates was a regimental mate. The evidence shows only that he was a surgeon's mate, without distinguishing whether he was in the hospital department or in a regiment.

2. *This claim is barred by limitation* under the resolutions of November 2, 1785, and July 23, 1787, (4 Journals, 603, and 762,) and the act of February 12, 1793, (1 Stat., 301.)

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

HEIRS OF DOCTOR GEORGE YATES, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

It is alleged that George Yates, the intestate, was surgeon's mate in the revolutionary army, and entitled to half-pay for life; and that, being so entitled, he is embraced by the resolve of Congress of March 22, 1783, by which commutation of five years' full pay is given to those revolutionary officers who were entitled to half-pay for life.

It is for such commutation that this suit is brought.

The said resolve of 1783 gives the commutation to those officers who were entitled to half pay for life under the resolve of Congress of October 21, 1780, or that of January 17, 1781; and we must therefore inquire whether surgeons' mates were entitled to half-pay for life under either of the two last mentioned resolves.

The resolve of the 21st October, 1780, says that the officers who shall continue in the service to the end of the war shall also be entitled to half-pay during life, to commence from the time of their reduction. General Washington, in a letter to Congress of the 5th of November, 1780, says, among other things, "that in the British army, from whence most of our rules and customs are derived, and in which long experience and improvement has brought their system as near perfection as in any other service, the surgeons of the hospital and regimental surgeons are, upon reduction, entitled to half-pay. The mates in both, I believe, are not." Congress soon afterwards, having considered that letter, passed the aforesaid resolve of the 17th January, 1781. That resolve provides that certain half-pay for life should be paid to the officers therein mentioned, of the hospital department and medical staff, who should serve to the end of the war, or become supernumerary. But surgeons' mates are not mentioned.

Our opinion is, that the resolves of 1780 and 1781, together, constitute one system, and are to be construed as if passed at the same time; and that they do not embrace surgeons' mates; and we cannot, therefore, consider them entitled to commutation under said resolve of 1783. It is stated by the Committee on Revolutionary Claims, in 1838, that the board of war, in 1784, decided that said resolve of 1783 was not applicable to surgeons' mates; and the committee state, also, that the Continental Congress was of the same opinion.—(Book of Rev. Claims, 462.)

We think that the claimants have no cause of action.

IN THE COURT OF CLAIMS

Hunt v. James George Yates, et. The United States.

Justice McLean delivered the opinion of the Court.

It is alleged that George Yates, the intestate, was engaged in the revolutionary army, and entitled to half-pay for his; and that, before he died, he was authorized by the Committee of Congress of March 23, 1783, to which communication of 250 years' full pay is given. These revolutionary officers who were entitled to half-pay for life.

It is for such communication that this suit is brought. The said resolution of 1783 gives the communication to those officers who were entitled to half-pay for life under the resolution of Congress of October 24, 1780, or that of January 17, 1781; and we must there find out whether or not Yates was entitled to half-pay for life under either of the two last mentioned resolutions.

The resolve of the 24th October, 1780, says that the officers who shall continue in the service to the end of the war shall also be entitled to half-pay during the continuance of the war. The resolve of the 17th of November, 1781, says, among other things, "that in the British army, from whence most of our valor and courage are derived, and in which long experience and improvement has brought their system to that perfection as in any other service, the surgeons of the hospital and regimental surgeons are, upon resolution, entitled to half-pay." The cases in both I believe, are not. Congress was afterwards having considered that matter, passed the following resolution of the 17th of January, 1781. That resolve provides that certain half-pay for life should be paid to the officers therein mentioned, at the hospital, department and medical staff, who should serve to the end of the war, or become supernumerary. But surgeons, makes are not mentioned.

Our opinion is, that the resolves of 1780 and 1781, together, create one system, and are to be construed as if passed at the same time; and that they do not embrace surgeons, makes; and we cannot there find evidence that they were intended to communicate under said resolve of 1781. It is stated by the Committee on Revolutionary Claims, in 1838, that the word of war, in 1781, should be read and resolve of 1783 was not applicable to surgeons, makes; and the committee state, also, that the Continental Congress was of the same opinion.—Book of Res. Claims,

We think that the claimants have no cause of action.

Wm. D. D. 1838—2—1

SAMUEL J. HENSLEY.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

SAMUEL J. HENSLEY *vs.* UNITED STATES.

1. The petition of the claimant and amended petition.
2. Articles of agreement between O. M. Wozencraft and claimant, transmitted to House of Representatives.
3. Original bills of exchange in favor of claimant, on which the claim was preferred, transmitted to House of Representatives.
4. Depositions filed in the case, and numbered 1, 2, 3, 4, 5, 6 and 7, transmitted to House of Representatives.
5. Claimant's brief.
6. United States Solicitor's brief.
7. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Washington, this third day of February,
[L. s.] A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

To the Judges of the Court of Claims of the United States of America, established by the act of Congress approved 24th of February, in the year 1855:

Your petitioner, Samuel J. Hensley, a citizen of the State of California, and therein residing, most respectfully represents to this Court:
That in the year 1850, the white men had overspread the greater

part of the State of California; had intruded upon the lands occupied by the Indians; had driven them from their dwellings, hunting grounds, valleys, and fisheries, into barren mountains, where even the resource of acorns was wanting to supply their craving appetites. By reason thereof the Indians became exceedingly hostile, robbing and murdering the whites, which caused the whites to retaliate, and thus a predatory, sanguinary warfare between the Indians and the white men was raging.

Under these circumstances, the government of the United States was called to perform its moral duties, of protecting and feeding the Indians, over whom the United States claimed the jurisdiction and authority of a guardian over his ward; and of preventing the whites from obtruding upon lands to which the Indian right of occupancy had not been extinguished, neither to the United States nor to any other government; and also of producing a state of peace between the Indians within the bounds of the State of California and the whites, who were attracted from all parts of the United States, and from foreign lands, in search of gold which was abundant in the lands occupied by the Indians.

Therefore, the Congress of the United States, by act approved September 30, 1850, (IX Stat. at Large, by L. and B., p. 558,) appropriated money "to enable the President to hold treaties with the various Indian tribes in the State of California;" and President Fillmore appointed three commissioners, viz: Reddick McKee, G. W. Barbour, and O. M. Wozencraft, to hold treaties with the various tribes of Indians in the State of California.

The instructions to these commissioners have not been made public, but it is to be presumed that the commissioners had discretionary powers and trusts commensurate with the exigencies, whereby to bring the Indians into a mood to treat, and to pacify them until the President and Senate should approve or disapprove the treaties which should be made.

These commissioners (as your petitioner is informed and believes, and so believing charges) arrived in California early in January, 1851, and entered upon their duties. The Indians would not consent to treat unless their pressing necessities for food were at once relieved, and promises given of future supplies. The commissioners soon dissolved the board wherein they were acting jointly, and divided the State into three districts, in which they acted separately. Numerous treaties were made in these districts by the respective commissioners with the various tribes or bands of Indians within the said districts, in each of which cases the Indians were not only furnished with food during the times of treating, but the treaties stipulated for further and future supplies in times to come. These very numerous treaties were, as it is understood, rejected by the Senate, and so they have never been published; wherefore your petitioner cannot now speak of their contents with any greater certainty.

On the 10th day of February, 1852, O. M. Wozencraft, who was one of the commissioners aforesaid, (and also an Indian agent,) using the discretionary powers in him vested as commissioner, and urged by the provisions of the treaties, and by the pressing wants of the Indians

for food, and to prevent them from choosing between starvation and plundering, robbing, and murdering of the whites, purchased of your petitioner, Samuel J. Hensley, nineteen hundred head of cattle for beef, to be delivered between the Mokuelumne river and the Four rivers, when, and as the same should be required by said Wozencraft, at the price of fifteen cents per pound, to be paid in bills drawn by said agent of the government upon the Secretary of the Interior, as more fully appears by the written contract of that date, mutually signed and sealed, and herewith shown, marked Exhibit A.

Your petitioner avers, that in accordance with said contract he delivered the said nineteen hundred head of beef cattle, weighing eight hundred and eighty-three thousand three hundred and thirty-three pounds and one-third of a pound, ($883,333\frac{1}{3}$ l s.,) which at the contract price of fifteen cents per pound amounted to the sum of one hundred and thirty-two thousand five hundred dollars; and therefore the said Wozencraft gave your petitioner seven bills, drawn in his official capacity, on the Secretary of the Department of the Interior, dated on the eleventh day of February, 1852, payable to the order of your petitioner one day after date, whereof one of said bills was for fifty thousand dollars, (\$50,000,) another for forty-nine thousand dollars, (\$49,000,) a third for fifteen thousand dollars, (\$15,000,) a fourth for ten thousand dollars, (\$10,000,) a fifth for two thousand dollars, (\$2,000,) a sixth for four thousand five hundred dollars, (\$4,500,) and the seventh for two thousand dollars, (\$2,000,) making together the said sum of one hundred and thirty-two thousand five hundred dollars, the price of the beef cattle so as aforesaid delivered at the contract price of fifteen cents per pound.

These bills were presented for payment to the Secretary of the Interior, and for want of an appropriation of money by Congress, for payment thereof, they were protested for non-acceptance and non-payment, in the month of March, 1852, and yet remain wholly unpaid, and are the property of your petitioner, and will be produced in due time to this court.

Your petitioner states that the said price of fifteen cents per pound was very low, the price of beef being at the time twenty-five cents per pound generally in that part of California; and he relies upon the absolute necessity of that supply of beef to feed the Indians; upon the moral obligation of the government to furnish it; upon the discretionary powers confided to the commissioners and incident to the business for which they were appointed and sent; the benefit resulting therefrom to the people and government of the United States in keeping the Indians from robbing, shooting, and killing the white people, who were acquiring millions of gold from the lands of the Indians, to which the Indian right of occupancy had not been extinguished, and upon the confidence which this petitioner and others justly and rightfully reposed in the public officers of the government, duly appointed and sent to treat with the Indians, and to put a stop to the warfare then raging to a grievous extent between the Indians and the white people, the Indians robbing, shooting, and killing the whites, and they retaliating by pursuing, attacking, and slaughtering the Indians.

Your petitioner prays that the solicitor for the United States appointed to represent the government before this honorable Court may be required to answer to this petition; that such proceedings may be had thereon as justice and equity require, and that on the final hearing this Court will grant to your petitioner such relief as his case merits.

R. ROSE,
GEORGE M. BIBB,
For the petitioner.

DISTRICT OF COLUMBIA,

City of Washington, July 31, 1855.

This day before me the undersigned, one of the justices of the peace of the United States in and for the said city, duly appointed, sworn, and acting as such, came Joseph C. Palmer and made oath that the statements relative to matters of fact in the foregoing petition of Samuel J. Hensley are true, to the best of his knowledge and belief; the affiant himself living in California and having personal knowledge of the contract, and of the bills drawn after the delivery of the cattle.

JOSEPH C. PALMER.

Sworn to before me on the day, year, and place mentioned in the caption.

N. CALLAN, J. P. [SEAL.]

EXHIBIT A.

Articles of agreement made this 10th day of February, A. D. 1852, between O. M. Wozencraft, Indian agent in the State of California, of the first part, and Samuel J. Hensley, of the second part, witnesseth as follows, to wit:

1st. On consideration of the hereinafter mentioned agreement on the part of the said party of the first part, the said party of the second part hereby agrees to sell and deliver to the said party of the first part, agent as aforesaid, nineteen hundred head of beef cattle, to be delivered between the Mokuelumne river and the Four rivers, when and as the same may be required by the said party of the first part, at the rate and price of fifteen cents per pound, payable as hereinafter mentioned.

2d. On consideration of the above agreement on the part of the said party of the second part, the said party of the first part, agent as aforesaid, hereby agrees to purchase and receive from the said party of the second part, at the time and place and in the manner above mentioned, the said nineteen hundred head of beef cattle, at the said rate and price of fifteen cents per pound, and to pay the said party of the second part therefor at the rate and price aforesaid, by drafts drawn by the said party of the first part, agent as aforesaid, upon the

Secretary of the Interior of the United States, at the time or times of delivering said cattle.

In witness whereof the said parties have signed these presents the day and year first before written.

O. M. WOZENCRAFT, [SEAL.]
United States Indian Agent.

SAM'L J. HENSLEY. [SEAL.]

Witness: EDWARD BOSQUI.

IN THE COURT OF CLAIMS.

AMENDED PETITION FILED BY LEAVE OF COURT.

And the said petitioner, Samuel J. Hensley, by leave of court, first had and obtained, in addition to the facts set forth in his original petition, saith that he was at the date thereof the sole owner of the claims therein preferred.

BIBB & ROSE,
for Claimant.

DISTRICT OF COLUMBIA,
County of Washington.

Robert Rose, agent and of counsel for the above named petitioner, deposeth and saith that the facts above set forth are true, as he verily believes.

ROBERT ROSE.

Subscribed and sworn before me this 2d November, 1858.

E. M. GARNETT,
Assistant Clerk Court of Claims.

Articles of agreement made this tenth day of February, A. D. 1852, between O. M. Wozencraft, Indian agent in the State of California, of the first part, and Samuel J. Hensley, of the second part, witnesseth as follows, to wit:

First. On consideration of the hereinafter mentioned agreement on the part of the said party of the first part, the said party of the second part hereby agrees to sell and deliver to the said party of the first part, agent as aforesaid, nineteen hundred head of beef cattle; to be delivered between the Mokuelumne river and the Four rivers, when and as the same may be required by the said party of the first part, at the rate and price of fifteen cents per pound, payable as hereinafter mentioned.

Second. On consideration of the above agreement on the part of the said party of the second part, the said party of the first part, agent as aforesaid, hereby agrees to purchase and receive from the said party of the second part, at the time and place, and in the manner above mentioned, the said nineteen hundred head of beef cattle, at the said rate and price of fifteen cents per pound; and to pay the said party of

the second part therefor, at the rate and price aforesaid, by drafts drawn by the said party of the first part, agent as aforesaid, upon the Secretary of the Interior of the United States, at the time or times of delivering said cattle.

In witness whereof, the said parties have signed these presents, the day and year first before written.

Witness: EDWARD BOSQUI.

O. M. WOZENCRAFT, [SEAL.]
U. S. Indian Agent.
 SAM'L J. HENSLEY, [SEAL.]

EXCHANGE FOR \$15,000.—No. —.

SAN FRANCISCO, *February* 11, 1852.

One day after sight of this first of exchange, (second unpaid,) pay to the order of Samuel J. Hensley fifteen thousand dollars, value received, and charge the same to account.

O. M. WOZENCRAFT,
United States Indian Agent.

HON. ALEX. H. H. STUART,
Secretary of the Interior, Washington, D. C.

Protested for non-payment, March 23, 1852.

J. D. J., N. P.

EXCHANGE FOR \$50,000.—No. 2.

SAN FRANCISCO, *February* 11, 1852.

One day after sight of this second of exchange, (first unpaid,) pay to the order of Samuel J. Hensley fifty thousand dollars, value received, and charge the same to account.

O. M. WOZENCRAFT,
United States Indian Agent.

HON. ALEX. H. H. STUART,
Secretary of the Interior, Washington, D. C.

EXCHANGE FOR \$10,000.—No. 3.

SAN FRANCISCO, *February* 11, 1852.

One day after sight of this second of exchange, (first unpaid,) pay to the order of Samuel J. Hensley ten thousand dollars, value received, and charge the same to account.

O. M. WOZENCRAFT,
United States Indian Agent.

HON. ALEX. H. H. STUART,
Secretary of the Interior, Washington, D. C.

EXCHANGE FOR \$4,500.—No. 4.

SAN FRANCISCO, *February 11, 1852.*

One day after sight of this second of exchange, (first unpaid,) pay to the order of Samuel J. Hensley four thousand five hundred dollars, value received, and charge the same to account.

O. M. WOZENCRAFT,
United States Indian Agent.

Hon. ALEX. H. H. STUART,
Secretary of the Interior, Washington, D. C.

EXCHANGE FOR \$2,000.—No. 5.

SAN FRANCISCO, *February 11, 1852.*

One day after sight of this second of exchange, (first unpaid,) pay to the order of Samuel J. Hensley two thousand dollars, value received, and charge the same to account.

O. M. WOZENCRAFT,
United States Indian Agent.

Hon. ALEX. H. H. STUART,
Secretary of the Interior, Washington, D. C.

EXCHANGE FOR \$49,000.—No. 6.

SAN FRANCISCO, *February 11, 1852.*

One day after sight of this first of exchange, (second unpaid,) pay to the order of Samuel J. Hensley forty-nine thousand dollars, value received, and charge the same to account.

O. M. WOZENCRAFT,
United States Indian Agent.

Hon. ALEX. H. H. STUART,
Secretary of the Interior, Washington, D. C.

Protested for non-acceptance, March 16, 1852.

C. H. J., N. P.

EXCHANGE FOR \$2,000.—No. 7.

SAN FRANCISCO, *February 11, 1852.*

One day after sight of this second of exchange, (first unpaid,) pay to the order of Samuel J. Hensley two thousand dollars, value received, and charge the same to account.

O. M. WOZENCRAFT,
United States Indian Agent.

Hon. ALEX. H. H. STUART,
Secretary of the Treasury, Washington, D. C.

\$15,000.

WASHINGTON CITY, *March 27, 1852.*

Please to take notice that a draft for fifteen thousand dollars, drawn by you on Hon. Alex. H. H. Stewart, Secretary of the Interior, in favor of Samuel J. Hensley, dated San Francisco, February 11, 1852, at one day after sight, is this day protested for non-payment, and that the holders look to you for the payment thereof, payment having been duly demanded.

Respectfully,

J. DAWSON JAMES,

Notary Public, Washington County, D. C.

O. M. WOZENCRAFT.

\$15,000.

WASHINGTON CITY, *March 27, 1852.*

Please to take notice that a draft for fifteen thousand dollars, drawn by O. M. Wozencraft on Hon. Alex. H. H. Stewart, Secretary of the Interior, in favor of yourself, dated San Francisco, February 11, 1852, at one day after sight, and endorsed by you, is this day protested for non-payment, and that the holders look to you for the payment thereof, payment having been duly demanded.

Respectfully,

J. DAWSON JAMES.

Notary Public, Washington County, D. C.

SAMUEL J. HENSLEY, Esq.

No. —

Exchange for \$15,000.

SAN FRANCISCO, *February 11, 1852.*

One day after sight of this first of exchange, (second unpaid,) pay to the order of Samuel J. Hensley fifteen thousand dollars; value received, and charge the same to account.

O. M. WOZENCRAFT,

U. S. Indian Agent.

Endorsed: SAMUEL J. HENSLEY. Pay to the order of D. Moodey, cashier.

E. D. COLLIER.

Pay D. Sprigg, esq., cashier, or order.

DAVID MOODEY, *Cashier.*

Pay R. Smith, esq., cashier, or order.

D. SPRIGG, *Cashier.*

Protested for non-payment March 2, 1852.

J. D. J., *N. P.*

Hon. Alex. H. H. STUART,

Secretary Interior, Washington, D. C.

UNITED STATES OF AMERICA,
District of Columbia, County of Washington, } *to wit:*

Be it known that on the twenty-seventh day of March, in the year eighteen hundred and fifty-two, I, J. Dawson James, notary public, residing in said county, duly commissioned and sworn, at the request

of the trustees of the Bank of the Metropolis, presented at the office of the Secretary of the Interior the original draft of which the above is a copy, and demanded payment thereof, whereunto I was answered by the chief clerk, "it cannot be paid."

Therefore, I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, against the drawer and endorsers of the said draft, and all others whom it may or doth or may concern, for all costs, exchange, re-exchange, charges, damages, and interest, suffered and to be suffered for want of payment thereof. And, on the same day, I deposited in the post office of Washington city notice of protest to drawer and each endorser, viz:

Notice for O. M. Wozencraft,	} Directed to D. Moody, esq., cashier, Steubenville, Ohio.
Notice for Samuel J. Hensley,	
Notice for E. D. Collier,	
Notice for D. Moody, cashier,	

In testimony whereof I have hereunto set my hand and affixed my [L. S.] notarial seal of office, the day and year aforesaid.

J. DAWSON JAMES,
Notary Public.

Protesting fee \$1 75.

Recorded, book A, folio 132.

Duplicate notices for the above parties, with notice to D. Sprigg, cashier, directed to D. Sprigg, esq., cashier, Baltimore, Maryland.

No. 6.

SAN FRANCISCO, *February* 11, 1852.

Exchange for \$49,000.

One day after sight of this first of exchange, (second unpaid,) pay to the order of Samuel J. Hensley forty-nine thousand dollars, value received, and charge the same to account.

O. M. WOZENCRAFT,
U. S. Indian Agent.

Hon. ALEXANDER H. H. STUART,
Secretary Interior, Washington, D. C.

Endorsed:

SAMUEL J. HENSLEY.

Pay the American Exchange Bank, or order.

PAGE, BACON & CO.

Pay Messrs. Corcoran & Riggs, or order.

CHAS. A. MEIGS, *Cashier.*

Protested for non-acceptance March 16, 1852.

C. H. JAMES, *N. P.*

UNITED STATES OF AMERICA,
District of Columbia, county of Washington, } *to wit:*

Be it known that on the twentieth day of March, in the year of our Lord eighteen hundred and fifty-two, at the request of Messrs. Corcoran & Riggs, holders of the original draft, whereof a true copy is above written, I, C. H. James, notary public in and for the county aforesaid duly appointed and qualified, and residing in the city of Washington, in the district aforesaid, presented said draft at the Department of the Interior, and demanded payment thereof, and was answered by Mr. Goddard, chief clerk, "it cannot be paid."

Wherefore, I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the drawer as endorsers of the said draft, as all others whom it may concern, for exchange, re-exchange, and all costs, charges, damages, and interests suffered, and to be suffered, for want of payment according to the tenor of said draft.

Thus done and protested, at the city of Washington aforesaid, and, on the same day I addressed written notices to the drawer and endorsers of said draft, informing them that it had not been paid, and that they would be held responsible for the payment thereof, and deposited them (addressed to C. A. Meigs, Esq., Cashier, New York) in the post office in Washington city.

In witness whereof, I have hereunto set my hand and affixed my [L. s.] seal notarial, the day and year aforesaid.

C. H. JAMES,
Notary Public.

Protest, \$1 75.

Rec. Lib. No. 2.

No. 1.

IN THE UNITED STATES COURT OF CLAIMS.

In the matter of SAMUEL J. HENSLEY *vs.* THE UNITED STATES.

Testimony on behalf of petitioner.

M. B. Lewis, being duly sworn, deposes and says: I am a farmer, aged forty-nine years; I have resided for the last year, and reside at present, at the Fresno, Mariposa county. I have no interest, direct or indirect, on the subject of this inquiry, and am not related in any degree to the claimant.

Question. Do you know of the delivery of any cattle by Major S. J. Hensley to the commissioners to hold treaties with the Indians in California, or to any one of them, or to any one by their order, for the use of the United States.

Answer. I do.

Question. When, to whom, and where were they delivered?

Answer. In the month of May, 1852, to Major Savage, on the Fresno, and by the order of Commissioner Wozencraft.

Question. How many head were delivered to Major Savage, and what was their average weight?

Answer. Between twelve and thirteen hundred head, weighing on an average five hundred pounds each.

Question. In what capacity was Major Savage?

Answer. Sub-Indian agent, acting under Commissioner Wozencraft, one of the commissioners, &c.

Question. Do you know of the delivery of any more cattle by Major Hensley for the use of the United States; and if so, to whom?

Answer. Yes; in the spring of the year 1853, four hundred head or thereabouts were delivered by Major Hensley, or on his account delivered to Lieutenant Beale, the superintendent of Indian affairs, for account of the United States.

Question. Do you know what disposition was made of the cattle delivered to Major Savage and Lieutenant Beale?

Answer. Those delivered to Savage were slaughtered and distributed to the Indians at Tuolumne, Merced, Fresno, San Joaquin, King river, and Four rivers; those delivered to Beale I have no knowledge what disposition was made of them, but I believe they were distributed to the Indians; the weight of the cattle was about five hundred pounds each.

Question. What was the market price of beef at the time the cattle delivered by Hensley were slaughtered, and at the points where they were delivered to the Indians?

Answer. Retail price about twenty-five cents; wholesale price from fifteen to twenty cents, cash.

Question. Do you know Commissioner Wozencraft?

Answer. I do.

Question. What was your occupation at the time these cattle were slaughtered and delivered to the Indians, and were you familiar with the slaughtering and distribution of the cattle delivered by Major Hensley to Major Savage to the Indians?

Answer. I was census agent at Mariposa county, and I was perfectly familiar with the slaughtering and distribution of the cattle to the Indians.

Question. Do you know whether the Indians were at war with, and murdering the whites at that time, or shortly before the treaties were made with them?

Answer. I do; and I have no doubt whatever but that the distribution of the provisions quieted them.

I do not know of any other matter relative to the claim in question.

M. B. LEWIS.

STATE OF CALIFORNIA, }
County of San Francisco, } ss:

On this 29th day of September, A. D. 1855, personally came M. B. Lewis, the witness within named, and after having been sworn to tell the truth, the whole truth, and nothing but the truth, the questions

contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of M. B. Lewis, taken at the request of the claimant, S. J. Hensley, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of S. J. Hensley. The solicitor of the United States Court of Claims was represented by Gwyn Page, esq., who did attend at the taking of the said deposition, and did not object thereto.

WM. HART, [L. S.]
Commissioner.

No. 2.

IN THE UNITED STATES COURT OF CLAIMS.

In the matter of SAMUEL J. HENSLEY *vs.* THE UNITED STATES.

Testimony on behalf of petitioner.

Lewis Leach, being duly sworn, deposes and says, that I am a practicing physician, aged 32 years; my residence for the last year was on the Fresno river, in the Mariposa county. I have no interest, direct or indirect, in the subject of this inquiry, and I am not related in any degree to the claimant.

Question. Do you know of the delivery of any cattle by Major S. J. Hensley to the commissioners to hold treaties with the Indians in California, or to any one, by their order, for or on account of the United States?

Answer. I do.

Question. To whom, when, and where were they delivered?

Answer. In May, 1852, to Major James D. Savage, on the Fresno river, and by order of Commissioner Wozencraft, and for distribution among the Indians.

Question. How many head were delivered to Major Savage, and what was their average weight?

Answer. Twelve hundred and eighty-five head, and averaged, by agreement with Wozencraft, at five hundred pounds each, and which was a fair estimate of their weight.

Question. Who was Major Savage?

Answer. Acting sub-Indian agent under Commissioner Wozencraft, and who distributed the cattle to the Indians.

Question. Do you know of any more cattle being delivered by Hensley, for the Indians, on account of the United States?

Answer. Some four hundred and twenty-eight head, averaging about five hundred pounds each, were delivered to Lieutenant Beale, superintendent of Indian affairs, by Major Hensley.

Question. What disposition was made of the cattle delivered to Savage and Beale?

Answer. Those delivered to Savage were slaughtered and distrib-

uted among the Indians at Tuolomne, Merced, Fresno, San Joaquin, King river, and the Four rivers, and I cannot say what disposition was made of those delivered to Lieutenant Beale.

Question. What was the market price of beef at the time these cattle were slaughtered and distributed to the Indians at the points or in the neighborhood where the cattle were slaughtered as aforesaid?

Answer. Retail about 25 cents per pound; by the head, about 15 to 20 cents per pound, cash.

Question. Were you perfectly familiar with the slaughtering and delivery to the Indians of the cattle, delivered by Hensley, as aforesaid to Savage, and by him distributed to the Indians, under the treaties?

Answer. I was, and knew personally of the delivery of the whole of them to the Indians, and killed several of them myself for such delivery and distribution.

Question. Do you know whether the Indians were at war with the whites at the time, or shortly before the treaties were made with them; and was the cattle purchased from and delivered by Major Hensley given to the natives to quiet them at that time?

Answer. I know that the natives had killed, and were then killing the whites in their neighborhood, and that the distribution of the cattle delivered by Hensley as aforesaid quieted the Indians. I do not know of any other matter relating to the claim in question.

LEWIS LEACH.

STATE OF CALIFORNIA, }
County of San Francisco, } ss.

On this 29th day of September, A. D. 1855, personally came Lewis Leach, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Lewis Leach, taken at the request of the claimant, S. J. Hensley, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of S. J. Hensley. The Solicitor of the United States Court of Claims was represented by Gwyn Page, esq., who did attend at the taking of said deposition, and did not object.

WM. HART, [L. s.]
Commissioner.

No. 3.

IN THE UNITED STATES COURT OF CLAIMS.

In the matter of SAMUEL J. HENSLEY *vs.* THE UNITED STATES.

Testimony on behalf of petitioner.

Lorenzo D. Vinsenhaller, being duly sworn, deposes and says: I am a farmer, aged 48 years; my residence, for the last year, was at Fresno, in Mariposa county; at present I am residing at Los Angeles; and I have no interest, direct or indirect, in the subject of this inquiry, and am not related in any degree to the claimant.

Question. Do you know of the delivery of any cattle by Major S. J. Hensley to the commissioners to hold treaties with the Indians in California, or to any one by their order, on account of the United States?

Answer. I do.

Question. When, to whom, and where were they delivered?

Answer. To Major Savage on the Fresno, May 4, 1852, by order of Commissioner Wozencraft.

Question. How many head were delivered to Major Savage, and what was their average weight?

Answer. Twelve hundred and eighty-five head, averaging five hundred pounds each head.

Question. Who was Major Savage?

Answer. Sub-Indian agent, acting under O. M. Wozencraft, one of the commissioners to hold treaties, &c.

Question. Were any more cattle delivered, and to whom, on account of the United States, by Major Hensley, the claimant?

Answer. Yes; four hundred and twenty-eight head in February or March, 1853, to Lieutenant Beale.

Question. Who was Lieutenant Beale?

Answer. He was superintendent of Indian affairs.

Question. Do you know what disposition was made of the cattle delivered to Major Savage?

Answer. They were slaughtered at Tuolumne, Merced, Fresno, San Joaquin, King river, and the Four rivers, and distributed to the Indians at those several places.

Question. What disposition was made of the cattle delivered to Lieutenant Beale, and what was their average weight?

Answer. I cannot say what disposition was made of them; their average weight was five hundred pounds each.

Question. What was the market price of beef at the time these cattle were slaughtered and given to the Indians at the points or in the neighborhood where the cattle were slaughtered and distributed as aforesaid?

Answer. Twenty-five cents per pound; fifteen to twenty cents wholesale.

Question. Do you know Commissioner Wozencraft?

Answer. I do.

Question. What was your connexion with the commissioner at the time the treaties were made with the Indians?

Answer. I was pilot and interpreted sometimes.

Question. What was your connexion with Major Savage at the time the cattle were slaughtered as aforesaid, and delivered to the Indians?

Answer. I was his partner in merchandise and farming.

Question. Were you perfectly familiar with the slaughtering and delivery to the Indians of the cattle before referred to?

Answer. I was; I killed and delivered many of them myself.

Question. Do you know whether the Indians were at war with, and murdering the whites at the time or shortly before the treaties were made with them?

Answer. There was a war, and they killed several whites; an arrangement was made with the Indians by the commissioners, that they, the Indians, should receive supplies of provisions, and after which provisions had been given to them they were quieted; the provisions thus given were the cattle furnished by Major Hensley on the order of Commissioner Wozencraft for the United States service.

Question. In consequence of some trifling delay in the furnishing of the provisions as aforesaid, did the Indians threaten to renew hostilities?

Answer. I don't know that they absolutely threatened to renew hostilities, but I know that any delay in furnishing them with the provisions would have caused an immediate outbreak.

Question. Do you know the price paid for the beef supplied to the government troops that were stationed at Fort Miller in the immediate vicinity where a large portion of the beef was issued to the Indians?

Answer. I don't know precisely what the government paid; but beef was selling all throughout the country at that time at twenty-five cents per pound, retail; by the single bullock at about nineteen cents, and in large quantities, a little less; fifteen cents per pound for a large herd, if paid in cash at the time of delivery as aforesaid would have been, and was a very low price, and there was no owner of cattle who would have disposed of his stock for anything like such a price if he supposed there would be any delay in the payment. Major Hensley had full confidence in the United States government, and took the drafts in question as cash; in fact it was considered a cash sale at low cash prices. I don't know of any other matter relative to the claim in question.

L. D. VINSENHALER.

STATE OF CALIFORNIA, }
County of San Francisco, } ss:

On this 29th day of September, A. D. 1855, personally came Lorenzo D. Vinsenhaller, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of L. D. Vinsenhaller, taken at the request of the claimant, S. J. Hensley, to be used in the investigation of a claim against the United States now pending in the

Court of Claims, in the name of S. J. Hensley. The solicitor of the United States Court of Claims was represented by Gwyn Page, esq., who did attend at the taking of the said deposition and did not object thereto.

WILLIAM HART, [L. S.]
Commissioner.

Fees of witness, \$ —; travel expenses of witness, attendance, \$3; commissioner's fees, \$4 40; total, \$7 40.

I was present on the 29th September, 1855, representing the United States, at the request of Montgomery Blair, solicitor for the United States Court of Claims, at the taking of the depositions of M. B. Lewis, Lewis Leach and L. D. Vinsenhaller, witnesses for Samuel J. Hensley, in the matter of claim *versus* the United States. I did not make any formal cross-examination of the witnesses, for the reason that I was satisfied in the progress of the examination, that I could elicit nothing for the benefit of the United States.

GWYN PAGE.

No. 4.

IN THE COURT OF CLAIMS.

SAMUEL J. HENSLEY *vs.* THE UNITED STATES.

The testimony of General James W. Denver, on the part of the claimant:

1st interrogatory. What is your name?

Answer. James W. Denver.

2d interrogatory. What is your occupation?

Answer. A lawyer by profession.

3d interrogatory. What is your age?

Answer. Thirty-six.

4th interrogatory. Where has been your place of residence for the past year?

Answer. Sacramento, State of California.

5th interrogatory. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

Answer. None in the world.

6th interrogatory. Are you related in any degree to the claimant?

Answer. I am not related in any degree to the claimant.

7th interrogatory. How long have you resided in California?

Answer. Since September, 1850.

8th interrogatory. Have you knowledge of the condition of the Indians in the southern part of the State of California during the latter part of 1850, and the years 1851 and 1852?

Answer. I have no direct personal knowledge, but I derive knowledge from common report, and from the examination afterwards of the claims of volunteers for services rendered in wars with the Indians, having been appointed one of the board of examiners of such claims by the State of California.

9th interrogatory. Have you any knowledge of any provisions having been furnished to those Indians, or any portion of them, by the claimant, Hensley, and others?

Answer. I have no personal knowledge of such facts; but as it was a fact of common report, I have never doubted it. As to the quantity or quality of the provisions furnished, I know nothing about it.

10th interrogatory. Did, or did not the furnishing of such provisions or supplies have the effect to quiet and restrain those Indians from hostilities with the whites?

Answer. I think there can be no doubt that it did; because many of them, so soon as the supplies ceased, commenced hostilities.

11th interrogatory. Do you know any other matter or thing relative to the claim in question?

Answer. Nothing that I can at present remember.

J. W. DENVER.

UNITED STATES OF AMERICA,
District of Columbia, to wit:

On this second day of April, A. D., 1856, personally came James W. Denver, the witness named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner in the presence of the witness, and by the commissioner proposed to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of James W. Denver, taken at the request of Robert Rose, attorney for the claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Samuel J. Hensley. The adverse party was notified, did not attend, and did not object.

JOHN S. TYSON,
Commissioner.

[Commissioner's fees and charges, \$1 72. Paid.]

No. 5.

IN THE COURT OF CLAIMS.

SAMUEL J. HENSLEY vs. THE UNITED STATES.

The testimony of Philemon T. Herbert, taken on the part of the defendant.

1st interrogatory. What is your name?

Answer. Philemon T. Herbert.

2d interrogatory. What is your occupation?

Answer. An attorney at law.

3d interrogatory. What is your age?

Answer. Thirty years.

4th interrogatory. What has been your place of residence for the past year?

Answer. Mariposa, State of California.

5th interrogatory. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

Answer. I have none.

6th interrogatory. Are you related in any degree to the claimant? if yea, in what degree?

Answer. I am not related in any degree.

7th interrogatory. How long have you resided in California?

Answer. Since July, 1849.

8th interrogatory. Have you knowledge of the condition of the Indians in the southern part of the State of California during the years eighteen hundred and fifty-one and fifty-two?

Answer. During the year 1852, I resided near several tribes of southern Indians in Mariposa county, State of California, in San Joaquin valley, and had knowledge of the condition of the Indians in the south part of the State of California.

9th interrogatory. Have you any knowledge of a state of hostilities between those Indians and the whites, in the State of California? If yea, what was the cause and character of those hostilities during that period?

Answer. I have knowledge of such hostilities. They commenced early in the year of 1851, and lasted several months. The general report as to the cause of these hostilities, was that the whites were encroaching upon the territories of the Indians. After hostilities had ceased, I travelled through a portion of these Indians, and ascertained from them that they considered that territory as theirs, and that they would not suffer themselves to be driven from it. These hostilities were very destructive on both sides, both as to life and property.

10th interrogatory. Have you any knowledge of any provisions having been furnished to those Indians, or any portion of them, by the claimant, Hensley, and others?

Answer. I have knowledge of provisions and goods having been furnished to them by James D. Savage, and others whose names I do not recollect, but whom I considered as agents of Savage. These provisions and goods were furnished in great abundance.

11th interrogatory. Did or did not the furnishing of such provisions and supplies have the effect to quiet and restrain those Indians from hostilities to the whites?

Answer. From my personal knowledge I am satisfied that the furnishing these provisions and supplies did have the effect to quiet and restrain those Indians from hostilities to the whites.

12th interrogatory. Do you know whether those provisions were furnished by and according to treaty between the United States and those Indians? If yea, what were the names of the commissioners who negotiated that treaty on the part of the United States?

Answer. I have knowledge, from public report, that those provisions and supplies were furnished by and according to treaty; and also

from the same source, that Messrs. Wozencraft, McKee and Barbour, were the commissioners who negotiated said treaties.

13th interrogatory. Have you any further knowledge of any matter relative to the claim in question?

Answer. Nothing that I can think of now.

P. T. HERBERT.

UNITED STATES OF AMERICA, }
District of Columbia, } ss.

On the 3d day of April, A. D 1856, personally came Philemon T. Herbert, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Philemon T. Herbert, taken at the request of Robert Rose, esq., attorney for claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of George McDougal. The adverse party was notified, did not attend, and did not object.

JOHN S. TYSON, *Commissioner.*

No. 6.

[Exhibit referred to in the annexed deposition.]

United States Indian Department in account with Major James D. Savage & Co., in the receipt and delivery of cattle to the Indians in the Valley of the San Joaquin.

1852.

May	5.	Delivered to Hosa Rays, cattle.....	30
	8.	Do.....do.....do.....	15
	12.	Do.....do.....do.....	20
	16.	Do.....do.....do.....	18
	21.	Do.....do.....do.....	20
	24.	Do.....do.....do.....	11
	28.	Do.....do.....do.....	18
	31.	Do.....do.....do.....	15
June	12.	Do.....do.....do.....	18
	16.	Do.....do.....do.....	15
	20.	Do.....do.....do.....	20
	24.	Do.....do.....do.....	16
	30.	Do.....do.....do.....	18
July	5.	Do.....do.....do.....	20
	10.	Do.....do.....do.....	19
	14.	Do.....do.....do.....	18
	18.	Do.....do.....do.....	20

July	22.	Delivered to Hosa Rays, cattle.....	15
	26.	Do.....do.....do.....	18
	30.	Do.....do.....do.....	20
Sept.	6.	Do.....do.....do.....	20
	11.	Do.....do.....do.....	13
	16.	Do.....do.....do.....	22
	20.	Do.....do.....do.....	19
	25.	Do.....do.....do.....	20
	30.	Do.....do.....do.....	10
Oct.	3.	Do.....do.....do.....	4
	13.	Do.....do.....do.....	3
May	5.	Delivered to Tom Kit.....	20
	12.	Do.....do.....	15
	20.	Do.....do.....	25
	28.	Do.....do.....	6
June	12.	Do.....do.....	12
	16.	Do.....do.....	12
	20.	Do.....do.....	14
	24.	Do.....do.....	10
	28.	Do.....do.....	12
	30.	Do.....do.....	6
July	6.	Do.....do.....	15
	13.	Do.....do.....	20
	20.	Do.....do.....	25
	29.	Do.....do.....	22
Aug.	8.	Do.....do.....	12
	18.	Do.....do.....	17
	26.	Do.....do.....	15
Sept.	7.	Filled order of Maj. G. W. Patten.....	40
	15.	Delivered to Tom Kit.....	10
	25.	Do.....do.....	10

[At a feast held at the farm of Major James D. Savage & Co., on the first day of June, 1852, the following named tribes were present, viz: Chowchillas, Pohoniches, Chooc Chaucees, Nookchoos, Howeeches, Pitcatches, Talliuches, Toomnos, Coshona, Woonas, Waches, Notoomthas, Wymitches, Itaches, and Choonymnes.]

June	1.	Delivered to the above named tribes.....	27
	3.	Do.....do.....	22
	5.	Do.....do.....	25
	7.	Do.....do.....	21
	9.	Do.....do.....	25
	14.	Delivered to Pasquale, Laceese, Nicolas, and Mates.	7
	16.	Do.....do.....do.....do.....do.....	5
	18.	Do.....do.....do.....do.....do.....	5
	20.	Do.....do.....do.....do.....do.....	5
	22.	Do.....do.....do.....do.....do.....	5
	24.	Do.....do.....do.....do.....do.....	5

June 26.	Delivered to Pasquale, Laceese, Nicolas, and Mates.	5
30.	Do.....do.....do.....do.....do...	8
Aug. 15.	Delivered by Castro for a feast on the Cowese.....	100
Oct. 16.	Number cattle on hand, or lost.....	212
May 1.	Received of O. M. Wozencraft, beef cattle.....	1,285

José Rays received cattle for the following tribes on the Fresno river: Chowchillas, Nookchoos, Chookchancees, Pohoniches, and Howeeches.

IN THE UNITED STATES COURT OF CLAIMS.

SAMUEL J. HENSLEY vs. THE UNITED STATES.

The deposition of Edward F. Beale, taken before me, William Hart, commissioner of the Court of Claims, at my office in the city of San Francisco, on the 17th day of May, 1856, a witness on the part of the United States, and who testified as follows:

Question. State your name, age, occupation, and place of residence for the last year.

Answer. Edward F. Beale; aged 34 years; Ranchero, San Francisco.

Question. State if you have any interest, direct or indirect in the claim of Samuel J. Hensley for cattle supplied to the United States in 1852, for the Indians in California.

Answer. None whatever.

Question. State if you are in any degree related to said claimant.

Answer. I am not.

Question. State if you held any appointment under the President of the United States in connexion with the Indian department, if so, state what appointment it was.

Answer. I held the appointment of Superintendent of Indian Affairs for the State of California.

Question. State if you know anything connected with the claim of Major Hensley against the United States for cattle supplied to the Indians in California, and if yea, what it was.

Answer. On my return from the eastern States in the year 1852, after having been appointed superintendent of Indian affairs for the State of California, I receipted to O. M. Wozencraft for an order for two (2) hundred head of cattle, represented to me to be the balance of 1,285 head of cattle delivered or furnished by Major Hensley (the claimant) to O. M. Wozencraft for distribution among the Indians of California. The order was on L. D. Vinsenhaller, from whom I received the annexed account of the distribution of 1,285 head of cattle delivered by Major Hensley. The number left on hand or supposed to be lost, but which I afterwards collected, was 212 head. I subsequently, in the course of my duties as superintendent of Indian affairs, understood that the cattle receipted for by me as before mentioned,

were the balance of the cattle delivered to Wozencraft by Hensley. This was not only common report, but it was so stated to me by Wozencraft and Vinsenhaller.

From all that I could learn when I was in California, as superintendent of Indian affairs, I have every reason to believe that the claim of Major Hensley against the United States is a just one.

E. F. BEALE.

STATE OF CALIFORNIA, }
County of San Francisco, } ss.

On this seventeenth day of May, A. D. 1856, personally came Edward F. Beale, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the Commissioner and then proposed by him to the witness, and the answers thereto were written down by the Commissioner in the presence of the witness, who then subscribed the deposition in the presence of the Commissioner. The deposition taken at the request of the Solicitor of the United States to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Samuel J. Hensley. The said Samuel J. Hensley was duly notified by me, and did attend and did not object or cross-examine the witness.

WILLIAM HART,
Commissioner.

Commissioner's fees \$5.

No. 7.

IN THE COURT OF CLAIMS.

SAMUEL J. HENSLEY vs. THE UNITED STATES.

Interrogatories propounded to Oliver M. Wozencraft on the part of the petitioners.

1st interrogatory. What is your name?

Answer. Oliver M. Wozencraft.

2d interrogatory. What is your occupation?

Answer. I am a physician.

3d interrogatory. What is your age?

Answer. Forty-two.

4th interrogatory. Where has been your place of residence for the past year?

Answer. In California

5th interrogatory. Have you any interest direct or indirect in the claim which is the subject of inquiry?

Answer. I have not.

6th interrogatory. Are you related in any degree to the claimant in this cause?

Answer. I am not.

7th interrogatory. Had you at any time, and when, any office or appointment in relation to the Indians in California; if yea, state what it was?

Answer. I was appointed a commissioner by the government of the United States to make treaties with the Indians in California; this was in autumn, 1850; I was also appointed Indian agent in California at the same time.

8th interrogatory. Were or were not the Indians in California in the year 1851, and in the spring of 1852 in great want of food, almost in a starving condition?

Answer. They were.

9th interrogatory. Did commissioners G. W. Barbour, R. McKee, and yourself, make a treaty or treaties with some of the southern tribes of Indians in California, stipulating to furnish the tribe or tribes with beef and flour for subsisting them in the years 1851 and 1852?

Answer. We did.

10th interrogatory. Did one or more of the commissioners, and which, cause supplies of beef to be purchased of Samuel J. Hensley to a large amount? If yea, state who caused it, and all particulars relative thereto?

Answer. I caused supplies of beef to be purchased of Samuel J. Hensley for various tribes of Indians in the San Joaquin valley. The quantity was nineteen hundred head of cattle—averaging in weight five hundred pounds each—at fifteen cents per pound.

11th interrogatory. In what mode did you contract to pay for said beef, and did you fulfil your contract; state particularly?

Answer. I agreed to give drafts on the Secretary of the Interior, the Indian bureau being a part of that department, for the amount of the purchase money which was one hundred and forty-two thousand five hundred dollars; I drew those drafts accordingly, and delivered them to Samuel J. Hensley.

12th interrogatory. Was said beef actually slaughtered and delivered to the said Indians?

Answer. About thirteen hundred head were slaughtered and delivered to the Indians under my supervision; the remainder, six hundred were turned over to E. F. Beale, superintendent of Indian affairs for California, by the direction of the Indian bureau.

13th interrogatory. Was the price, aforesaid, of fifteen cents per pound given as aforesaid to Hensley, the ascertained market price at the time and place of delivery. If nay, was it above or below it, and how much?

Answer. It was about the market price of beef at the time and place of delivery.

14th interrogatory. At the time when you arrived in California with the other commissioners, was there not actual hostilities between the Indians and whites of California?

Answer. We arrived about the beginning of January, 1851, at which time or thereabouts, there was an existing war between the two races, Indians and whites. The said war was violent, bloody, and destructive.

15th interrogatory. What effect had the furnishing those Indians with supplies, according to treaty, towards pacifying them?

Answer. The granting those supplies at once produced and perpetuated peace; there have been no mutual hostilities since or any outbreak on the part of those Indians.

Propounded by the commissioner.

Final interrogatory. Do you know any other matter or thing relative to the claim in question?

Answer. I do not.

O. M. WOZENCRAFT.

Cross-interrogatories propounded on the part of the United States by the solicitor of the Court of Claims.

1st interrogatory. What authority had you to enter into the contract spoken of in your examination-in-chief?

Answer. My authority was a commission to me jointly and severally with two other commissioners, to make such treaties and compacts with the Indians of California, as we or either of us might deem just and proper, which commission was signed by the President of the United States.

2d interrogatory. Did Major Hensley know that you knew that you had no authority to make such contracts?

Answer. He did not, nor did I; because such was not the fact.

3d interrogatory. When you spoke of the number of cattle delivered and butchered, did you speak of facts within your personal knowledge or from the reports of your employés or subordinates, and is that true likewise of the number turned over to Beale?

Answer. From my personal knowledge and from the report of my subordinates I know the amount I spoke of as butchered and slaughtered to be correct; and the same is true of the number turned over to Beale.

4th interrogatory. Give the number that you know of your own knowledge to have been fed to the Indians, either whilst you were in office or under your successor, Beale.

Answer. The number which I knew of my own knowledge to have been fed to the Indians whilst I was in office was thirteen hundred head; what number was fed to them by Beale I do not know.

5th interrogatory. State what other contracts you entered into for the same purpose, and the amounts agreed to be paid for such objects?

Answer. I entered into several. One with Dent, Vantyne & Co., at fifteen cents per pound; one with Samuel Norris, at twenty cents per pound; one with George McDougal, at twelve cents and a half per pound, upon condition, however, that if it was not paid by the next session of Congress, then I would allow him fifteen cents per pound.

6th interrogatory. How many Indians were there who received these provisions, and during what time were they fed?

Answer. It is hard to say accurately how many Indians received these provisions; but I believe at the lowest estimate they would number 75,000. They might possibly number 100,000. They were fed in the years 1851 and 1852.

O. M. WOZENCRAFT.

UNITED STATES OF AMERICA,
District of Columbia, to wit:

On this 24th day of March, 1856, personally came Oliver M. Wozencraft, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by him in the presence of the witness, who subscribed the deposition in the presence of the commissioner. The deposition of Oliver M. Wozencraft, taken at the request of ——— Rose, counsel for the claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Samuel J. Hensley.

The solicitor of the United States was notified; did not attend and did not object, but furnished the written interrogatories herewith filed.

JOHN S. TYSON,
Commissioner.

IN THE COURT OF CLAIMS,

ON THE PETITION OF SAMUEL J. HENSLEY.

Brief of Montgomery Blair, of Counsel for Claimant, on the reargument of the case, November term, 1858.

This claim originated in an agreement between Hensley, the claimant, and O. M. Wozencraft, Indian agent of the United States in California, dated 10th February, 1852, by which Hensley contracted to deliver nineteen hundred head of beef cattle, averaging 500 pounds in weight, on the Mokuelumne and Four rivers, and Wozencraft agreed on behalf of the United States to pay therefor at the rate of fifteen cents per pound.

The proof shows that 1,713 head of the cattle, averaging 500 pounds in weight, making a total of 856,500 pounds of beef, were delivered under this contract, 1,285 head to Wozencraft, and 428 head to Beale, his successor, (see depositions of M. B. Lewis, Lewis Leach, L. D. Vinsenhaller, and Wozencraft; also that of Beale, taken on the part of the United States;) for which, at fifteen cents per pound, which it is not denied is a reasonable rate, there is due the sum of \$128,475.

Under ordinary circumstances the claimant would have stopped with proving the delivery of the cattle; but as the conduct of agent Wozencraft had been severely criticised by Superintendent Beale, in respect to some other transactions, in his report dated 25th February, 1853, Ex. Doc. 57, 2d session 32d Congress, (hereinafter referred to as Doc. 57,) the claimant thought it proper to show, not only the delivery to Wozencraft, but that Wozencraft had actually fed 1,073 of the cattle to the Indians, and turned over 212, the remainder of

the 1,285 delivered to him, to Beale himself. Beale's own testimony was, however, taken by the United States, subsequently to the taking of such testimony by Hensley; and as he admits that Wozencraft's transaction with Hensley was correct, and the claim a just one, that proof on Hensley's part was rendered unnecessary.

None of the transactions condemned so strongly by Beale, in Doc. 57, could be confounded by persons familiar with the subject with Hensley's. But, as Wozencraft was connected with them, and with his also, it was thought best to rebut any unfavorable presumption against Hensley arising from that fact; and yet, from the severity of Beale's report upon Wozencraft, Hensley would not call upon Beale to testify; but the United States did call on him, and he confirms the testimony on the part of the claimant. The solicitor, indeed, considers his omission to speak of the delivery to him of the 428 head of cattle, in 1853, as a conflict in his testimony with that of claimant's witnesses on that point. This is certainly an untenable proposition. His silence, if it implies anything, is, on the contrary, evidence of his assent to the truth of the statement. But the true explanation of it is, no doubt, that his attention was not called to it as a matter in dispute. It is evident, indeed, that he thought the only question of fact about which there would be doubt, would be as to the delivery to Wozencraft.

As to the obligation of the government to compensate the claimant.

The act of 30th September, 1850, 9 Stat., p. 558, appropriated the sum of \$25,000 "to enable the President to hold treaties with the various Indian tribes in the State of California," and the act of 27th February, 1851, appropriated \$25,000 "addition to the appropriation of 30th September, 1850." The act of 28th September, 1850, authorized the President to appoint three Indian agents for the Indian tribes within the State of California.* Reddick McKee, O. M. Wozencraft, and G. W. Barbour were appointed, and on the 15th October, 1850, (see Senate Doc. 4, special session 1853, p. 8,†) were instructed to use "all possible means" to "make such treaties as may be just and proper." On the arrival of the agents (or commissioners, for they acted in both characters) in California, in December of that year, they found that strife existed between our citizens and the Indians throughout the land.—(See letters of Adam Johnston, Indian agent, and from the commissioners and Superintendent Beale, generally in Doc. 4, and particularly those on pp. 35, 36, 38, 52, 53, 54, 56, 65, 104, 133; also the depositions of General Denver in this case, then residing in California, and now Commissioner of Indian Affairs; and also the depositions in the Frémont case.) The commissioners, in their letter of the 17th of February, 1851, (p. 56,) from the San Joaquin, say what General Denver confirms, that a general border war was imminent. The war had been carried on by volunteers,

* This bill was introduced by Senator Frémont, and was originally entitled an act to preserve peace among the Indian tribes in California by extinguishing their territorial claims in the gold mine district.—(See Globe, vol. 21, 1793, 1528.)

† This document is hereinafter referred to as Doc. 4, and sometimes when a page is cited.

each receiving \$10 per day, (p. 56,) under the State authority, for about three months, and a war debt contracted amounting to about \$2,000,000, (Doc. 4, 248,) of which the United States have reimbursed the amount of \$924,259 65.—(10 Stat., p. 583.)

The cause of this strife was the encroachment of the whites upon the lands of the Indians, which had driven most of them to the mountains, where they were starved, from whence they returned from time to time for the purposes of plunder and revenge. Those who remained were reduced to servitude, (see Wozencraft's letter, July 15, 1851, p. 133,) and some of them were captured and brought from the mountains to be made slaves of.—(See Beale's Report, Doc. 57.)

The contest was marked by the massacres, murders, and plunderings which characterize the warfare of the races, in an aggravated form, and such was the exasperation existing that the old agent, Adam Johnston, who had been for some time in the region of the Fresno, towards which, as the most threatening point, the commissioners first directed their efforts, wrote to the department on the 7th March, before the arrival of the commissioners, saying that he doubted the possibility of obtaining peace, (page 65.)

War in such circumstances, it was manifest to every one, could not bring peace, except it was a war of extermination; and aside from all considerations of humanity, the mere cost of such a war would have been so enormous as to make it the duty of the commissioners to avoid it by all possible means. Soldiers could not be got in the regular army to carry it on. The ranks of the small number of regular companies in California were constantly reduced by desertion. The pay of volunteers was \$10 per day, (p. 56;) transportation was proportionably expensive. Beale, in his letter of May 11, 1852, (p. 326,) refers to the estimates of the Quartermaster General to show authentically at what enormous rates only could the transportation for troops be obtained in California, and says that the cost of such a war could not be estimated. If the State expended so large a sum in the short time the war was carried on by it with a few small tribes, and the loss arising from the abandonment of the mines which it occasioned was, as Beale says, (p. 329,) equally great, what, he asks, would have been the pecuniary loss from a war with the entire Indian population of California? What the commissioners say, May 15, 1851, that it "is cheaper to feed the whole flock a year than to fight them a week," was therefore obviously true. Such was the expensive character of the war which the whole community felt to be impending when the commissioners arrived in California.

If this general war was to be avoided at all, it could only be by prompt and decisive action, and the necessity of such action was felt by the department in Washington. The instructions already quoted directed the commissioners to use "*all possible means* to conciliate the Indians." The scene of action was too distant to admit of special instructions, and therefore none were given. But it is manifest from the urgency of the language quoted, as well as from the whole tenor of the instructions, that the department was aware that a great emergency existed. The journals and proceedings of both houses of Congress for that year show that petitions from the legislature and from

the people of California for protection came with every mail. The existence of the war and the atrocities which marked it were also well known to the executive government, and the occasion was one which called for the appointment of such men as could be safely clothed with large powers, and left unfettered by special instructions in their exercise, and this was done.

It was at once seen by the commissioners, (page 56,) that to avert the danger something must be done "besides merely treating with the Indians." It was idle to persuade the poor wretches to be quiet while they were famishing. No amount of good reasoning or of fair promises could appease the hunger which impelled them to violence. This was obvious to every one, and the commissioners so informed the department. "The Indians must have food," they wrote. If they could be got to go through the ceremony of a treaty, it would be of no avail; they could not keep it and live, unless fed. No other expedient but that adopted by the commissioners was then or has since been thought of to meet the emergency. The solicitor, on the former hearing, questioned the necessity of recourse to the policy adopted by the commissioners, on the ground that the Indians might have supported themselves by labor in the mines. Some of them, he says, did labor in the mines, and their labor was valuable. Beale's report, as we have seen, corroborates the statement that some of the Indians did labor in the mines, and that their labor was deemed valuable, for it shows that they were kidnapped and sold as slaves for that purpose. But it also shows that this slave trade was marked by the usual atrocities incident to that traffic, and was a great cause, no doubt, of the exasperated feeling existing; and Beale urges the plan of putting the Indians in reserves, which had been adopted by the commissioners, and of which, in order to protect them from this and other wrongs, he became an earnest advocate. It is true that some of the Indians had been accustomed to labor at the missions established in California by the Catholic church; but the labor performed by them was agricultural, and chiefly as herdsmen, which they had been induced to perform under the mild sway of the missionaries. The labor to which the solicitor refers was very different, and the miners, for whom it was to be performed, were not the men to overcome the constitutional aversion of the Indian to the toil it demanded by religious influences, or by any other considerate persuasion. Under them it was compulsory labor, and the Indians' unconquerable repugnance to this is familiar to all. The fact, however, that some of the California Indians had learned from the missionaries some of the habits of civilization, was one upon which the commissioners based their hopes of success in the plan of founding reserves for them, where they might labor for their own benefit under the protection of public officers, and where, by furnishing them with improved utensils for farming, and educating them gradually in the use of such instruments, and other culture, they would rapidly advance in civilization, and soon be able to support themselves. The commissioners, therefore, in taking with them to the Indian country supplies of beef and bread, took the only means which could possibly stay the tempest which was gathering, and these supplies proved to be much better credentials than the President's

commission. The poor famishing creatures, who had been hunted out of their homes by the river sides, where they had caught fish and gathered acorns, into the sterile mountains, where such game as there was they were not skilled in taking, saw unmistakable evidence, in this offer of food, that the white man's heart was not utterly insensible to their sufferings. As soon as the news reached them they came joyfully to the feast, forgave all wrongs, and from that day to the present have kept their faith and been at peace with our people. The old agent, Adam Johnston, who, on the 7th of March, as we have seen, seemed to despair of any useful result from the commissioners, in June, (page 104,) writes the department in altogether a different strain. He had been busily engaged, in the mean time, spreading the news of the coming and overtures of the commissioners to the Indians, had got them out of the mountains to meet and treat with the commissioners, and writes "that great good has resulted."

The danger was at an end, the Indians were in fact pacified, and the whole country agreed that it was the timely supply of food that had effected this happy result; and this is what the present able and judicious Commissioner of Indian Affairs, General Denver, then living in California, and from his position an attentive observer of the events, now attests. And so his predecessor of that day regarded the action of the commissioners. On receiving the first treaty and accompanying letters of the commissioners referred to above, he is not content with saying that "the provisions of the treaty are approved of," but adds that "the department fully appreciates the difficulties with which you have had to contend in executing the important trust confided to you, and is *highly gratified* at the results you have thus far achieved."—(page 15.)

All the treaties made are said by the commissioners to be similar; pp. 128, 138. I have not been able to obtain a copy of any one of them, as the injunction of secrecy has not been removed by the Senate, but the journal of the commissioners, p. 95, states the substance of that made with the tribes on the Fresno. It gave the sixteen bands of Indians present a reservation between that river and the San Joaquin, "commencing at a point on the Chouchille river; thence a line running south along the foot-hills, crossing the Fresno river and San Joaquin river; continuing south along the top of the Table mountain, at whose base we are now encamped, crossing King's river to a point called the Lone mountain, near the first of the Four creeks; the western limit or line to be fifteen miles from the eastern; the Chouchille river, and the first of the Four creeks (or a line near it,) will be the northern and southern boundaries;" promised them "that they should be provided with 500 beeves, 260 sacks of flour, 3,000 pounds of iron, 500 or 600 pounds of steel, all kinds of seed, and clothing, in each of the years 1851 and 1852; that they should be provided with a farmer, blacksmith, carpenter, teachers, and stock for farming, which must not be killed, or the farming implements destroyed. Some of these things (said the commissioners) we will commence to give you now, (the food;) others must have the sanction of the President. These things are intended for all the tribes that will settle with you. Colonel A. Johnston will be with you occasionally to assist you, and settle any

difficulties that may arise." The consideration on the part of the Indians was their relinquishment of all claims to their lands. This treaty, with others, was submitted by the President to the Senate for their approval, but was rejected. The grounds on which the treaties were rejected were that the reserves included lands upon which our citizens had settled, and the number and great extent and supposed value of the lands reserved. See Remonstrances, pp. 277 to 283; Beale's letter May 11, 1852, p. 326, wherein he reviews and defends the whole policy of the treaties, and after showing that the beet and flour given the California Indians were but substitutes suited to their circumstances for the annuities in *powder, lead, and guns* given to other Indians, he endeavors to meet the objections as to the reserve on the Fresno, and others in the southern part of the State, by showing that it is impracticable to remove the Indians out of the State, either across the Sierra Nevada or into Oregon, and that the lands in question were very poor, and that "the persons who complain of these reservations in the south have in no instance been able to point out other locations less objectionable and valuable than those already selected."

But, that the treaties failed to receive the sanction of the Senate for these reasons alone, is shown conclusively by the fact that this body afterwards, and during the same session, as well as in every subsequent session, has concurred in laws to carry into effect the plans of the commissioners, when modified so as to obviate the objections to the number and size of the reserves, and to exclude from them the lands occupied by the whites. By the act of 30th August, 1852, (10 Stat., p. 56,) the sum of \$100,000 is appropriated to be used "for the preservation of peace with those Indians who have been *dispossessed of their lands in California, until permanent arrangements* be made for their future settlement: *Provided*, that nothing herein contained shall be so construed as to imply an obligation on the part of the United States to support the Indians who have been dispossessed of their lands in California." The act of 3d March, 1853, (ib., p. 238,) provided for the *permanent arrangement* contemplated by the act of 1852, and "authorized the President to make *five* military reservations from the public domain in the State of California for Indian purposes, provided that such reservations shall not contain more than 25,000 acres in each; and provided further, that said reservation shall not be made upon any lands inhabited by citizens of California; and the sum of \$250,000 is hereby appropriated to defray the expense of *subsisting* the Indians in California, and removing them to said reservations for protection." The act of 31st July, 1854, (ib., p. 332,) appropriated \$200,000 "for defraying the expenses of continuing the removal and subsistence of Indians in California." The act also authorized the purchase of adverse titles to, "the reserved lands."

The act of 3d March, 1855, (ib. pp. 698, 699,) appropriated \$54,000 for "the pay of the physicians, smiths, carpenters, and agricultural and mechanical laborers on the reservations in California; \$125,000 "for the removal and *subsistence* of Indians" on said reservations; \$150,000 for founding two additional reservations, "collecting, removing, and subsisting the Indians of California" thereon. The act of

18th August, 1856, (Annual Laws, p. 79,) contains appropriations for the same purposes, amounting to \$200,000. The act of 3d March, 1857, (ib. p. 183,) contains an appropriation of about the same amount for the same purposes, and the act of 12th June, 1858, (ib. p. 330,) contains also such an appropriation, amounting to about \$200,000.

These acts are severally entitled "An act making appropriations for the current and contingent expenses of the Indian department and for fulfilling treaty stipulations with various Indian tribes for the years ending June 30," (1851, 1852, 1853, 1854, 1855, 1856, 1857, and 1858, respectively.)

The proceedings of the commissioners "for *preserving peace* with the Indians who had been dispossessed of their lands," and for collecting them in reservations for the purpose of preventing them from marauding on the whites, and protecting them from the whites, have therefore been expressly sanctioned by law, and Congress has appropriated more than \$1,300,000 for carrying their plan into effect.

The essential features of these laws and the treaties are the same. Both provide for collecting the Indians into settlements apart from the whites, and domesticating them and subsisting them temporarily; and it was to this common purpose of both the law and the treaties that the provisions obtained from Hensley were actually applied. And even if the *place* where this was done was material, it happens that the site at which the Indians were collected by the commissioners, at which Hensley's beef was fed to them, was in the vicinity of the present Fresno and King's River reservation; so that the beef was actually fed as subsistence to the Indians in collecting them at the present reservations, to all intents and purposes, and was applied by the proper officers of the government expressly to the purpose of *preserving peace with the Indians* who had been dispossessed of their lands in California, and in removing and subsisting them, and for no other object whatever. That Hensley's property had been, in a small part, applied to these objects before the appropriation to pay for it was made by Congress does not affect the legality of the transaction. That is a common case. There is no branch of the public service in which payments are not suspended for the want of appropriations, which are made as soon as the appropriation bill passes. The only question is, whether the appropriations, when made, were applicable to pay Hensley for the beef obtained from him and issued to the Indians to remove and subsist them, and this depends on the words of the law. As I have shown that these were sufficient, and that Beale, in whose hands this money was placed, and who was clothed by law (10 Stat., p. 3) with power "of exercising administrative examination over all claims and accounts, and vouchers for disbursements connected with Indian affairs in California," and who was specially directed to investigate these claims, (see letter of 7th April, 1852, p. 308,) decided, after examination made of this claim, that it was just, it will be asked why it was not paid? The answer is, *first*, that he preferred to apply the means in his hands to new engagements to be entered into by himself, and, in his opinion, they were not adequate for these new engagements, (see his report;) and, *second*, as the supplies obtained from Hensley were furnished to the

Indians in pursuance of treaties which were rejected by the Senate, it was supposed the appropriations were not intended to apply to them.

This appears by the letter of the Commissioner of Indian Affairs to Beale, in reference to the appropriations, dated 4th September, 1852, page 36, in which he says "*the treaties having been rejected* by the Senate, it has been determined to apply \$25,000 (of the appropriation) to the purchase of suitable presents," &c. The meaning of this, in view of the facts before us, is obviously that, as the treaties which stipulated for specific things which had been furnished to the Indians had been rejected, the department either felt constrained not to pay for the things with the means in their hands, or at least felt itself at liberty not to do so, showing plainly that it was assumed that there was some necessary connexion between the ratification of the treaties and the payment for the articles furnished the Indians, and this, too, when the department, as we have seen, itself approved the treaties and the furnishing of the provisions, only requiring that *in future treaties* the stipulations for furnishing the provisions should be "at a period sufficiently in the future to allow congressional action to meet the requisition;" letter of 25th June, 1851, page 17. And, indeed, it has been assumed throughout by the department, and even by some of the claimants, that there was some necessary connexion between the ratifications of these treaties and the payment for the purchases made, to carry into effect the plan of domesticating the Indians on reserves, which was, in the first instance, embodied in the form of treaties. But nothing could be more unfounded. Hensley was no party to the treaties, and their ratification or rejection could not affect him. His rights, as we have seen, depended on the appropriations which he and the commissioners and the department all expected would be made, and it could make no difference to him whether the treaties passed or not, if the law, in contemplation of *which* he surrendered his property to the public use, authorized payments to be made for the objects to which it was applied. I have shown that such appropriations, and ample in amount, were made. The fact that the purchases from Hensley were intended to fulfil the treaty, does not prevent the Court from considering them as applied under the law which was passed with the same objects. Indeed, the rule which requires the proceedings of public officers to be construed so as to make them legal when possible, would even authorize some straining of the language of the law for this purpose. But this is not necessary.

The appropriations were made expressly for the objects for which those provisions were applied. This is all that it is necessary for the claimant to show. But he might go further, and show that the government has in fact sanctioned everything actually done by these commissioners, except some of their paper transactions. Their treaties, and bills of exchange, have not been ratified; but the removal and subsistence of the Indians in reserves which they effected in part has been expressly authorized, and large sums appropriated to pay for the means used for those objects.

And effect has been given to their operations *by law* in other forms. For instance, the act of March 3, 1853, 10 Stat., 245, and other acts,

provide for the survey and sale of all public lands in California, and the report of the General Land Office of December, 1856, shows that 8,000,000 acres had been surveyed, and the surveys have progressed rapidly since; and whilst treaties have been made with the Indians in all other States and Territories for the surrender of their lands, none have been made with the Indians of California. This legislation, in the absence of any other treaties with the Indians for the possession of their lands, assumes that the Indian title has been extinguished in fact by the removal effected by the commissioners, and the Indians by their peaceful acquiescence in these measures, and in the continued encroachment of the whites on their lands, have undoubtedly acted on the assumption that their contracts with the commissioners were substantially subsisting engagements, which the government was carrying into effect from year to year. This also shows that the United States has substantially assumed by law the rights and obligations expressed by the treaties made by the commissioners, has taken possession of the Indian lands as rightfully belonging to it without making any other treaties, and has appropriated money for the subsistence and removal of the Indians to reserves, as stipulated for by the commissioners, as the consideration for their lands.

Nor is there anything in the laws which, whilst assuming the right to the lands which the commissioners had acquired, and providing substantially for the payments for which the commissioners had stipulated, could be construed to disavow the payments actually made by the commissioners. On the contrary, the appropriations are made for the identical objects with those to which two-thirds of Hensley's property was applied by Wozencraft, and to which one-third of it was applied by Beale, nearly all of it being fed after the appropriation of 1852 passed. No government or individual, in such circumstances, would be permitted by a judicial tribunal to escape responsibility. But here there is no ground for imputing to the government an attempt to evade payment for property actually used in its service. It has not only accepted and approved the results obtained by the commissioners, but it has appropriated money which should have been applied by the executive officers to pay for the indispensable means used by the commissioners and superintendent of Indian affairs in obtaining those results which were procured to so great an extent from the claimant in this case. It will not be questioned that Hensley is entitled to compensation for the cattle actually received by Beale. He himself construed the law as applicable to these, for he received them, and must be supposed to have applied them properly. But what conceivable reason is there for discriminating against Hensley as to those which were actually applied to the same purpose by Beale's predecessor in office? The object of the law was, in fact, much more effectuated by those applied by his predecessor than by Beale, for it was by that application that the peace, for which the appropriation was expressly made, was obtained.

But if it could be doubted that Congress, in adopting the results obtained by the commissioners, and their plan generally, and appropriating money to carry it into effect, intended to pay for the means

which were at that time being applied to the objects of the law, that doubt would be removed by considering the act of March, 1852.

Beale, the superintendent, by that act, (10 Stat., p. 3,) had "the power of exercising administrative examination over all claims and accounts and vouchers for disbursements connected with Indian affairs in the State of California which shall be transmitted to the Commissioner of Indian Affairs for final adjudication, and by him passed to the proper accounting officers for settlements;" a jurisdiction which he and the department construed to extend to this claim. (See his letter, Doc. 4, p. 308.) It was to enable the department to comply with the request contained in that letter, to excuse him from so much of the investigation required of him as related to the claim of Frémont, in consequence of his relations with Frémont, that the Committee on Indian Affairs reported the amendment to the Indian appropriation bill, on the 6th August, 1852, to be found in the Senate Journal, p. 575, in these words: "To enable the President of the United States to cause an investigation to be made into certain claims preferred against the United States, for provisions alleged to have been furnished to the Indians of California, ten thousand dollars." The Senate did not concur in this amendment; Mr. Atchison, among others who voted against it, objecting to it on the ground "that we have a superintendent of Indian affairs. An office of this kind has lately been created, *and a competent man has been appointed to fill it—one who is well qualified to investigate these claims.*"—(Globe, vol. 24, p. 2104.) Mr. Bell said, *ib.*, p. 2106: "I have heard it suggested that the law under the authority of which the superintendent of Indian affairs for California was appointed, clothes him with the power to examine these claims, and that there is some necessity for making a provision of this kind upon this occasion, in order to get an examining agent free from all suspicions of prepossession or prejudice. If that is so, it might be a reason why we should make the appropriation." Mr. Weller said: "I understand that the executive branch of this government have decided that it has no discretion under the law, but that it is *the imperative duty of the superintendent of Indian affairs to make the whole of this investigation*, and that unless the legislative department of the government shall relieve him, he will be compelled to make that investigation. I understand that *the Executive* has decided that, under the law, he has no discretion." Mr. Bell said: "I desire now to say a word in regard to the superintendent, because, when the proposition was made to establish a superintendency in California with *such large powers*, I was very determined to oppose the passage of such an act, on the ground that I knew, unless the superintendent was a man of extraordinary firmness and integrity of character, he would have it in his power to involve the government in millions annually, from which it would be difficult to extricate ourselves without paying the claims. I have inquired with regard to the character of the gentleman who has been appointed superintendent, and according to all the information that I can get from frequent conversations with him—from the experience he has had among the Indians in that country, from his intrepidity and firmness in all his past character—I thought him a very fit and proper man

to be appointed. If any reliance can be placed in human testimony with regard to the character of an individual—any reliance on the personal intercourse which we can have with other persons—he was a suitable man," &c.

As the legislature refused to relieve Beale from the investigations which the President considered it his imperative duty to make, under the law as it then stood, Beale proceeded to make the investigation, and the evidence in this case shows that his examination resulted in the opinion that Hensley's claim against the United States was a just one. And the concurrence of the friends and opponents of the administration in Beale's eminent fitness for the high trust evinced by the tributes to him above quoted from Senators Atchison and Bell, a circumstance so unusual in our times, adds moral weight to the legal effect of his judgment. The claim was not paid, and the vouchers transmitted to the Commissioner and the accounting officers, with the accounts of the superintendent, in consequence, as we have seen, of the rejection of the treaties, which the department construed as excluding it from the benefit of the appropriations—a proposition which I have already considered and contended against. But the case here does not depend on the correctness of that construction. The Commissioner's decision amounted to no more than to exclude the claims to be investigated by Beale from the benefit of the existing appropriations. Whether those whom Beale should find to hold just claims were entitled to have appropriations made for them, which is the question here, was not passed upon in that decision. That depends upon the question, whether Beale had power to take cognizance of the claims, and what effect is to be given to his action upon them. That it was intended by the law that he should investigate these claims, is certain. If the terms of the law itself were less explicit, the unquestioned construction which we have seen was given to it in the Senate, where it had just been enacted, and by the Executive, to the effect that the law, as it stood, made it the imperative duty of the superintendent to investigate these claims, would leave no room to doubt that it was a special object of the law, which conferred such large powers upon him, to require him to examine and pass upon these claims. For what end was this imperative duty imposed, unless a demand was to be paid, on which the superintendent made a favorable decision? I have already attempted to show what I believe to be the only logical conclusion, that in such case the existing appropriations were equally applicable to its payment as to the payment of any other recognized claim, because no legislative action was contemplated by the law, upon the decision of the superintendent with respect to such a claim, more than upon any other, and because such payments were equally within the objects of the law. They were excluded, however, ostensibly because the treaties failed; but in reality, I have no doubt, because of the inadequacy of the appropriations for the exigencies of the year. But whether properly or improperly excluded, it stands as a claim recognized as just by an officer instructed by the President to investigate it in pursuance of law, and nothing is required to complete the obligation of the government to pay such a claim.

It is also claimed that the President had power, under the uniform

usages of the government, which the Supreme Court have decided is as authoritative as the statute law itself, to take such measures as he deemed advisable to maintain peace with the Indian tribes in California. It does not require a statute of the United States to authorize the President to march the army into the Indian territory to put down Indian disturbances. Practically, his authority in our Indian relations is almost unlimited. He orders the army to make war upon them as he thinks the occasion requires. At this moment he is carrying on war with the Navajoes in Mexico, in which he captures them and causes them to be put to death without any authority from Congress, and it is but a few years since General Harney destroyed great numbers of the Sioux by the order of the President. If the President has this unlimited authority to kill and capture the Indians in order to preserve the peace among the tribes and towards the people of the United States, how can it be denied that his authority extends to collecting such of the Indians as are marauding and murdering the whites, and are being plundered and murdered in turn by the whites, into places where this process can be stopped, and can use the needful means for that purpose? It would seem to follow that if the Executive has exercised power from the beginning of the government of capturing and slaying the Indians whenever it seemed to him requisite for the public peace, that he had authority to collect them in places where they could be restrained from acts of rapine and violence. This is what was done by his authority and with his express approval in California, and the claim here presented is for the means furnished him to do this.

Reply to the objections of the Solicitor.

The Solicitor, on the rehearing, without controverting the fact that the supplies furnished by Hensley were applied to the objects for which the appropriations were made, or that it was customary to apply appropriations to pay for purchases made in advance of them, insisted that that was not done in such cases as this, where the purchase was made before the appropriation of 1852, which he said was the first, and that the practice referred to existed only where the annual appropriation was anticipated for objects for which there had been previous appropriations, as for the work or materials on the public buildings.

To this I replied that the appropriation of 1852 was not the first of the series of appropriations made for the objects in question, and that those of 1850 and 1851, cited above, were both for the same objects, and were applied to those objects; and that the case, therefore, differed in no respect from the ordinary one, where a disbursing officer exceeded his authority in receiving supplies beyond the amount of existing appropriations, which, although undoubtedly an irregularity, was always regarded as cured by the appropriation when made. There is no branch of the public service in which this is not of constant occurrence. And the act of March, 1852, constituting the superintendency, which, both by its terms and by its contemporaneous construction, required the superintendent to examine these claims, was

but a restriction against the payment of them, in accordance with this usage, unless they were found to be just by the superintendent.

The Solicitor also denied that Beale had made any report upon the claim which could be regarded as an adjudication of it. I did not say that he had made any *formal* report of this character. This was unnecessary. If the Court was satisfied that he had, in fact, examined the subject at the time he was superintendent, and come to the conclusion that it was a just claim, this was all that was necessary. The non-compliance with the form I explain above. It was no fault of the claimant. He might have made a report in form, and it might have been lost or destroyed. On proof of that fact it would not be denied, I presume, that Hensley was entitled to the benefit of the judgment in his favor. This would not be denied if the judgment had been that of a court of record. But here, when the law did not require any formal proceedings on the part of the officer in making up his judgment, or any formal record of it, no objection can be made to giving effect to the judgment actually arrived at by the officer, if that can be satisfactorily proved. The only material thing is, that it be shown that the officer did, in fact, make an examination, and arrive at the conclusion that the claim was just. This he swears he did, in a deposition taken by the government in this case. We have also an official report, made at the time, which is a summary of his investigations, intended to characterize generally the financial transactions of these commissioners, which shows that he had scrutinized them closely, and that whilst he was severe upon them as to other transactions, he casts no censure upon them for this, respecting which he testifies now explicitly that his judgment *then* was, that it was correct.

M. BLAIR,
For Claimant.

IN THE COURT OF CLAIMS.—No. 159.

SAM'L L. HENSLEY *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

Besides the testimony taken in this case, and yet unprinted, the following public documents of Congress will be referred to, viz :

Doc. 1, Senate, 2d Sess. 31st Congress, Annual Rep. Sec. Int.

Doc. 61, Senate, 1st Sess. 32d Congress, Debts Contracted by Indian Agents, &c.

Doc. 4, Senate, Sp. Sess. 1853, Correspondence with Indian Agents.

Which will be hereafter briefly designated as documents 1, 61, 4.

On or before the 14th of October, 1849, Adam Johnston was appointed sub-Indian agent on the Sacramento and San Joaquin rivers, in California, to include the Indians at or in the vicinity of those places, and any others to be subsequently designated by the Indian department.—(Com. Ind. Aff. to Johnston, Oct. 14, 1849, Doc. 4, p. 2.) This sub-agency was subsequently restricted to the Indians

“in the valley of San Joaquin.”—(Com. Ind. Aff. to Johnston, Nov. 24, 1849, Doc. 4, p. 5; also pp. 4, 6.) It does not, however, appear to have been the *object* of this restriction to limit this sub-agency on the south, but only to divide it from a new one created on the north, for Sacramento valley.

It seems this appointment was made under the 5th section of the act organizing the Department of Indian Affairs, approved June 30, 1834.—(4 Stat., 735.)

By act of September 28, 1850, (9 Stat., 519,) the President was authorized to appoint three Indian agents for California, and by an act approved September 30, 1850, (9 Stat., 558,) an appropriation of \$25,000 was made, “to enable the President to hold treaties with the various Indian tribes in the State of California.”

George W. Barbour, Redick McKee, and O. M. Wozencraft, were appointed agents under the act of September 28, 1850, but it being soon discovered that no appropriation had been made for their salaries, their functions and salaries as Indian agents for California were suspended; and they were appointed, under act of September 30, commissioners to treat with the Indians.—(Doc. 1, p. 29.) The instructions to them, dated October 15, 1850, as commissioners, are printed in Doc. 4, p. 8. The appropriation of \$25,000 was then remitted them.

By an act approved February 27, 1851, sec. 3, (9 Stat., 586,) it was enacted that “hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose.” The provisions of this act were communicated to the commissioners by the Commissioner of Indian Affairs, in a letter dated April 12, 1851, (Doc. 4, p. 14,) whereby they were informed that their offices and functions as commissioners were abrogated and annulled; they were, however, directed not to suspend negotiations, but to enter upon their appointments as agents, and were, *as such*, designated (under the act of 1851) to negotiate with the Indians of California under the instructions already given.

This letter was received by the commissioners in San Francisco early in June, 1851.—(Doc. 4, p. 130.)

By act of March 3, 1851, (9 Stat., 572,) a further appropriation of \$25,000 was made for expenses of treating with Indians in California, which was remitted to them by the Commissioner of Indian Affairs, June 25, 1851.—(Doc. 4, p. 17.)

On the 27th of June, 1851, (Doc. 4, p. 17,) the Commissioner of Indian Affairs wrote to the commissioners that the two appropriations of \$25,000 each constituted all the money applicable to the negotiation of treaties in California; and he said, “when the funds referred to have been exhausted, you will close negotiations and proceed with the discharge of your duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress.” This letter reached McKee September 14, near Humboldt river, (p. 186,) Barbour, at San Francisco, in September, (p. 260,) and Wozencraft, on the Sacramento river, September 2, (p. 180.)

The commissioners arrived at San Francisco between the 27th of December, 1850, and January 8, 1851, (Doc. 4, p. 53,) and soon after started southward up the valley of the San Joaquin, meeting and treating with the Indian tribes of the valley.—(Doc. 4, pp. 54 to 76.) Arrived near the head of the valley, at camp Barbour, May 1, (Doc. 4, p. 76,) they concluded to separate and act individually in their several districts, which had been determined by lot. Barbour took the southern district, Wozencraft the middle district, and McKee the northern district.

This division was communicated to the Commissioner of Indian Affairs, by letters of May 1 and 13, 1851, (Doc. 4, p. 77,) and approved by him June 27, 1851.—(Doc. 4, p. 17.)

From Camp Barbour Wozencraft returned to San Francisco May 13, and on the 24th left again to visit and treat with the Indians in the northern part of his district. From this he returned to San Francisco on or before the 30th of September, (Doc. 4, p. 187.) Besides what cash he had expended, he had incurred debts for provisions furnished to Indians up to September 16, to the amount of \$60,060, (Doc. 4, p. 189.)

This sum alone exceeded the whole appropriation, and he had previously, as above shown, received the letter of the Commissioner of Indian Affairs of June 27, 1851, directing him in that event to cease negotiation. From this date forward, therefore, September 16, 1851, he had no authority except as "agent simply."

The claim of Hensley arose long after this date.

Hensley made a contract with O. M. Wozencraft February 10, 1852, for 1,900 head of cattle, to be delivered between the Mokelumne river and the Four Rivers, when required, at the rate of 15 cents per pound, payable at the time or times of delivery by drafts on the Secretary of the Interior. On the next day, February 11, he stated an account charging for 1,900 head of cattle, at 500 pounds each, delivered to Indians in the San Joaquin and Tulare valleys, which Wozencraft certified to be correct, (Doc. 4, p. 363,) amounting to \$142,500, and drew drafts upon the Secretary of the Interior to the amount of \$137,500. In the petition it is stated that the quantity of beef was 83,333 $\frac{1}{3}$ pounds. These drafts were presented at the department in March, 1852, not accepted, and notice was given to Hensley and Wozencraft by protest. This protest must in course of mail have reached them in April, and no part of the beef was delivered to the persons who were to deliver it to the Indians till the 4th of May following. (See Vinsenhale's and other depositions for petitioner.)

Thus the parties had ample notice that the government repudiated the contract before any delivery took place under it.

The testimony goes to show that the beef was delivered to Savage, the Indian trader, contrary to the policy of the 14th section of the act establishing the Indian department, approved June 30, 1834. (See 4 Stat., 738.)

Savage was a trader, licensed to trade on several reservations where the Indians numbered rather more than 2,600.—(See Johnston's account and map of the reservations, Doc. 4, p. 241.)

The Indians on these reservations were mining for and trading with

Savage.—(Commissioner McKee's letter, July 29, 1851, Doc. 4, p. 128.) This trade was valuable; the traders were willing to pay large sums for licenses, and they realized great profits.—(Sub-Agent Johnston's reports of June 24, 1851, Doc. 4, p. 107, and December 4, 1851, *Id.* p. 246.) (See also Superintendent Beale's estimate of the value of Indian labor, *Id.* p. 374.)

Thus the representations of the great distress of Indians, (see Superintendent's Beale's letter, Doc. 4, p. 378,) and other similar reports, all entitled to credit, do not apply to the Indians on the reservations, but to the remainder of the 30,000 Indians in San Joaquin valley.

These Indians, therefore—those settled and working on the reservations—could have been in no need of such aid. And, moreover, ample provision had been made for occasional cases of want by the three commissioners, who, in August, 1851, had purchased and delivered to Sub-Agent Johnston, for the Indians south of the Chonchilla, 1,900 head of cattle, (Doc. 4, p. 268,) which was sufficient to last till May, 1852, (Doc. 4, p. 259.)

As to the part of the beef that was delivered, the exhibit in the deposition of Beale shows how recklessly it was wasted in feasts at Savage's ranch and elsewhere, instead of being carefully dealt out according to the wants of the Indians.

But all of it was not delivered. When Wozencraft was dismissed from office, in the autumn of 1852, he gave Superintendent Beale an order on Hensley, November 30, 1852, (Doc. 4, p. 389,) for 612 head of these cattle, still in the possession of the contractor, more than nine months after these drafts had been given in payment for them. There is some evidence to show that Beale subsequently received part of these, but not in his official capacity. Beale in his deposition does not admit that he received them, nor is it known what has ever been done with them.

On the part of the United States the Solicitor maintains that the commissioners had no authority to make contracts beyond what was expressly or impliedly given in their written instructions:

That if they had any such authority as commissioners, it was taken away by the act of February 27, 1851:

Or, if not by that act, then by the instructions of April 12, 1851, even if given under an erroneous construction of the act.—(U. S. *vs.* Eliason, 16 Pet., 291:)

And that all authority to negotiate treaties ceased under instructions of June 27, 1851, on or before the 30th of September, 1851.

It is further contended, that the contract with Hensley is void, being made contrary to the act of May 1, 1820, (sec. 6, 3 Stat., 568,) which prohibits any contracts, except such as are made under a law authorizing the same, or where there are appropriations adequate to their fulfilment:

And again, being made contrary to the provisions of the act of June 30, 1834, (sec. 13, 4 Stat., 757,) which prescribes the mode of purchasing goods for Indians:

And again, if these acts should not be held to apply, objection is further made for non-conformity to the act of March 3, 1809, (2 Stat., 536,) as construed by Attorney General Berrien August 29, 1829.

It is contended that no authority was given to the commissioners to do more than was necessary to conclude treaties ; that this authority did not extend beyond the conclusion of the treaties—*i. e.*, the commissioners could not, under the authority to conclude the treaties, agree with the Indians, as an inducement to accept terms, that the treaties themselves should be fulfilled before being ratified by the Senate, or even being forwarded to the President.—(See letters of Commissioner of Indian Affairs to them, June 25, 1851, and July 16, 1851, Doc. 4, pp. 17, 18.)

It is claimed by the petitioners that the relation of the government to the Indians is similar to that of guardian to his ward, and it is therefore bound for necessities furnished. If so, those who claim to have furnished necessities must prove the necessity, (Chitty Cont. 117, and cases there cited,) and that the government has funds of these wards in possession to pay the debt. But we deny the existence of that relation, and contend that the duty of the government to the Indians is one of imperfect obligation, and one which Congress only can acknowledge and discharge.

The Solicitor denies that Wozencraft had authority to purchase the cattle from Hensley.

He denies that the Indians for whom it was purchased needed the beef for their subsistence.

He denies that all the beef was delivered according to contract.

He denies that any of it ever came into the possession of any officer or agent of the United States.

And he maintains that the claimant, before he parted with his property, had ample notice that the government would not pay for it.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

SAMUEL J. HENSLEY *vs.* THE UNITED STATES.

LORING, Justice, delivered the opinion of the Court.

This is one of a class of cases pending before this Court, and arising under contracts made by commissioners and Indian agents of the United States in the State of California. The action of these commissioners and agents, in making the contracts, and the validity of the claims founded on them, have been in the argument of all of them rested in great measure upon the condition of the Indian country at the time the contracts were made, and thus that local history is a part of the evidence in this class of cases.

By act of Congress, September 28, 1850, (9 Stat. at L., 519,) the President was authorized to appoint three Indian agents for California.

And by act September 30, 1850, (9 Stat. at L., 558,) an appropriation of \$25,000 was made, "to enable the President to hold treaties with the various Indian tribes in the State of California."

Under the former act, Redick McKee, George W. Barbour, and O. M. Wozencraft, were constituted severally Indian agents in California, on October 10, 1850, (S. Doc. 4, p. 7,) but on the 15th of the same month their functions as Indian agents were suspended, and they were appointed "commissioners to hold treaties with various Indian tribes in the State of California, as provided in the act of Congress approved September 30, 1850."—(S. Doc. 4, p. 8.)

By act of Congress, February 27, 1851, (s. 3, 9 Stat. at L., 586.) it was enacted that "hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose." Under this act the functions of Messrs. McKee, Barbour, and Wozencraft, as Indian agents in California, were revived; and as such they were "designated to negotiate with the Indians in California," under the instructions theretofore given them as commissioners.—(S. Doc. 4, p. 14)

By letter dated October 15, 1850, (S. Doc. 4, pp. 8, 9,) the commissioners had been instructed as follows: "As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and compacts with them as may seem just and proper. On the arrival of Mr. McKee and Mr. Barbour in California, they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission. The board will convene, and after obtaining whatever light may be within its reach, will determine upon some rule of action which will be most efficient in obtaining the desired object, which is by all possible means to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties binding on them towards the government and each other. You will be able to judge whether it will be best for you to act in a body, or separately, in different parts of the Indian country."

It is observable that these instructions are very general, that they specify nothing but the objects of the government, and that emphatically repeating that object to be "to conciliate the good feelings" of the Indians, and to confirm those good feelings by permanent treaties, they leave it to the commissioners "to determine upon some rule of action which will be most efficient in attaining the desired object."

The reasons of the generality of these instructions, and the extent of the discretion vested in the commissioners, are illustrated by the preceding paragraph in the same letter: "The department is in possession of little or no information respecting the Indians in California, except what is contained in enclosed copies of papers, a list of which is appended to these instructions; but whether even these contain sufficient data to entitle them to full confidence will be for you to judge, and they are given to you merely as points of reference."

The generality of the instructions is pressed upon the attention of the department, in a letter dated December 6, 1850, (S. Doc. 4, 52,) in which Commissioner McKee states that the commissioners regret that their instructions from the government "are so meagre and

indefinite, and throw upon them necessarily so much responsibility. In the absence of direct and positive instructions, or even counsel and advice, we must do the best we can, relying upon your approval of what we may do, based upon an honest desire to promote at once the best good of the Indians, while we maintain the honor and evince the benevolent designs of our government towards the unfortunate aborigines."

Thus empowered and instructed the commissioners entered upon their duties by convening and organizing at San Francisco, January 13, 1851, and after obtaining information from the governor of California, and from the members of its legislature, then in session at San José, they proceeded to the Indian country in California, and the condition of that country at this time makes a material fact in this class of cases. The discovery of gold had filled it with miners, whose sudden and extensive emigration had brought into collision the interests of the whites and the rights of the Indians. Difficulties of a serious character had arisen between them, and, beginning in the northern part of the State, as early as July 6, 1850, (S. Doc. 4, pp. 38, 52,) had extended to its southern border, (S. Doc. 61, pp. 2, 3.) Mr. Adam Johnston, in his official report as sub-agent, dated September 16, 1850, (S. Doc. 4, p. 44,) says of the Indians: "They have an indefinite idea of their right to the soil, and they complain that the *pale faces* are overrunning their country and destroying their means of subsistence. The emigrations are trampling down and feeding their grass, and the miners are destroying their fish dams. For this they claim some remuneration, not in money—for they know nothing of its value—but in the shape of clothing and food."

And in December 6, 1850, (S. Doc. 4, p. 52,) Commissioner McKee, quoting an informant, says: "He informs me that the Indians on the waters of the Sacramento are in a very dissatisfied and unsettled state. Just before he left there was an outbreak, in which blood had been shed on both sides; and the next news from that quarter will probably announce increased disturbances, if not a general war between the whites and Indians." And in the same letter he thus continues: "They were mustering volunteers at Sacramento city and at other points when my informant left, and bloody work was anticipated. What is to be the result of this state of things I cannot even conjecture. The Indians claim the country as their native soil, or hunting and fishing ground, and the whites want to explore it for gold, and, if they find the metal there, will insist on retaining its possession." And in his letter of February 11, 1851, (S. Doc. 4, pp. 54, 55,) he says of the southern district: "So many direct injuries have been inflicted on these Indians by the whites, and so many promises made them of restitution and redress, all of which remain unfulfilled, that they have lost all confidence, and are now, we are told, fighting with desperation for their lives and their country. The whites have driven most of the southern tribes up into the mountains, from whence, as opportunities serve, they sally out into the valleys to steal and drive off the cattle and mules as the only alternative for starvation. Then comes up the cry of Indian depredations, invasion, murders, and the absolute necessity for exterminating the whole race." And generally the details of

the evidence submitted to the Court (S. Doc. 4, pp. 58, 60, 61, 62, 64, 65, 66, 71, 72, 81, 82, 83, 85, 89, 109, 113, 115) confirm the information given to the commissioners, and of which the summary is reported to by them, (S. Doc. 4, p. 56,) that hostilities of a deadly character existed between the Indians and whites in different portions of the State, threatening, indeed, *a general border war*.

And the state of the Indian country when the commissioners began their labor in it is clearly shown by the fact that the troops of California were in the field engaged in actual hostilities with Indian tribes, (S. Doc. 4, p. 71,) and by the instruction to the commissioners May 9, 1851, (S. Doc. 4, p. 15,) in which the Commissioner of Indian Affairs says: "I have been informed that it is deemed necessary by the War Department to commence active military operations against the Indians in California, and in that event it will be highly important that one or more of the agents shall accompany each detachment of the troops sent against them, so as to be in readiness to act in the capacity of negotiators should occasion require. What particular negotiations may be required it is impossible for this office to foresee; nor can it give any specific directions on the subject. Much must be left to the discretion of those to whom the business is immediately entrusted."

In this state of things the commissioners adopted the measure of bringing the Indians from their homes in the mountains and mining regions and placing them on reservations made for them by the commissioners from the unoccupied lands in the plains, and they proceeded to enter into treaties with the Indians, in which their removal into the reservations was made an indispensable condition, and their subsistence there was provided for for the years 1851 and 1852. In the report of the commissioners, dated March 25, 1851, (S. Doc. 4, pp. 69, 70,) in detailing their proceedings in the formation of the first treaty which they made, they say: "After submitting our propositions to them we desired them to retire and consult among themselves upon the terms that we had proposed, and in an hour we would again meet them and learn their decision, as well as hear propositions from them, if they desired to make any. When we again met them they expressed themselves satisfied with the terms we offered, except their removal from their mountain fastnesses to the plains immediately at the foot of the mountains. We then explained to them the necessity of such a removal and location, and *that we could treat with them upon no other condition*, believing that, if they were to remain in the mountains, constant conflicts between the Indians and miners would take place; that the Indians could not, nor would they attempt to, support themselves otherwise than by stealing horses, mules, and cattle from the farmers in the plains, and by depredating upon small parties of miners in the mountains. After we had explained these matters fully to them they again consulted together, and finally agreed to remove their families to the plains, as we desired."

And the proceedings and purposes of the commissioners are succinctly stated by Commissioner Barbour, (S. Doc. 61, p. 2,) when, after describing the strife between the Indians and the whites, he says: "Under such circumstances the commissioners undertook to effect a reconciliation and carry out the plan agreed upon for treating with the Indians.

Treaties were, with much trouble and delay, made by the joint board of commissioners with several tribes, with the terms of which you were in due time made acquainted. A very important feature in these treaties, and one, too, without which no treaty could have been made with the Indians, was the supply of an agreed amount of beef and flour to aid in the subsistence of the Indians treated with during the years 1851, 1852. Without some such provision the commissioners, as well as every intelligent man in California, knew that no treaty made with these Indians would be observed by them. Necessity as well as inclination would compel them to steal from the whites animals on which to subsist, as, in a large majority of cases, the stores of acorns laid up by them had been destroyed by the whites. The commissioners, therefore, urged by the calls of humanity and the voice of the whole country, could do nothing less than agree to furnish the provisions stipulated in the different treaties."

And the policy of the commissioners is stated by Commissioner Wozencraft, May 14, 1851, (S. Doc. 4, pp. 82, 83:) "You have been advised of the policy which we have deemed expedient to adopt; permit me to say a few words in relation to it. The common and favorite place of abode of the Indians in this country was in the valleys and within the range of mountains; the greater portion were located and had resided, as long as their recollections and traditions went, on the grounds *now being turned up for gold*, and now occupied by the gold hunters, by whom they have been displaced and driven higher up in the range of mountains, leaving their fisheries and acorn grounds behind.

"They have been patient in endurance, until necessity taught them her lesson, which they were not slow to learn, (as it is measurably intuition with the Indian,) and thus they adopt from necessity what was deemed a virtue among the Spartans; and the result is, we have had *an incipient border war*—many lives have been lost, an incalculable amount of property stolen, and the development and settlement of the country much retarded; and this will ever remain unavoidable so long as they are compelled or permitted to remain in the mountains. They can come down in small marauding parties by night and sweep off the stock of the miners and farmers, and before the loss is known they will be beyond pursuit; and I venture the assertion that this would be the case, in defiance of all the troops that could be kept here.

"Our policy is, as you have been informed, to get them down from their mountain fastnesses and place them in reservations along in the foot-hills bordering on the plains; the miners will then be between them and the mountains, making a formidable cordon, or barrier, through which it would be difficult to take their families unobserved; and in those reservations there will be no place for concealing stolen stock, and they can there have all the protection which can and should be afforded them against their persecutors; and lastly, they will there learn the ways of civilization, and thereby become useful members in the community instead of being——"

In pursuance of this policy the commissioners acted jointly until May 1, 1851, (S. Doc. 4, 74,) and thereafter severally, in forming the treaties under which the claim I read before the Court has arisen.

All the treaties made by the commissioners, jointly or severally, contained the stipulations that the Indians should remove from their mountains into the reservations on the plains, (S. Doc. 4, pp. 128, 138,) and should there receive specified amounts of provision for each of the years 1851, 1852; and, as we have seen, this was the policy adopted by the commissioners, and by them reported to the department in the beginning of their proceedings.—(S. Doc. 4, pp. 128, 138.)

On May 22, 1851, the Commissioner of Indian Affairs addresses the commissioners, officially, thus:

“GENTLEMEN: Your letters of March 5 and 25, 1851—the last enclosing a copy of a treaty entered into with the chief captains and headmen of six tribes of Indians in California, and one from Agent McKee, of March 24, 1851—have been received.

“The department fully appreciates the difficulties with which you had to contend in executing the important trust confided to you, and is highly gratified with the results thus far achieved, especially with your energy and despatch in procuring a location for several tribes of Indians, and promptly removing them to it.

“The provisions of the treaty, a copy of which is acknowledged above, are approved of.”

Under the treaties the Indians were removed on to the reservations.—(S. Doc. 4, pp. 70, 252.) The land of these reservations was poor in quality, uncultivated, and stinted in natural productions, and it was a necessary consequence of such removal of the Indians that they should be supplied with food. Mr. Wozencraft says, (S. Doc. 4, p. 83:)
“The country set apart for them is very poor soil; only a small part of it is adapted to agricultural purposes.” Mr. Johnston says, (S. Doc. 4, p. 105:)
“On the breaking out of the war in December last the Indians returned to the mountains, leaving behind them their principal stores of subsistence, intending to return for them as necessity required. The whites, in pursuing them, burned and destroyed all that fell in their way; consequently, at the time the different treaties were entered into the Indians of this region were destitute of anything to subsist upon, even if left to range at liberty over their native hills. Under each treaty they were required to come from the mountains to their reservations on the plains at the base of the foot-hills. They were but children of nature, ignorant of the arts of agriculture, and incapable of producing anything, if they had been placed on the best soil of the earth. They came from the mountains without food, depending on the small amount allowed in their treaties, with the roots and seeds, to be daily gathered by their females; these have been found wholly inadequate to their necessities.” Again, Mr. Johnston says, (S. Doc. 4, p. 244:)
“In none of these reservations is there any agricultural land, except in spots; a few acres only can be found together, and those upon the banks of the streams.” And Superintendent Beale says, (Doc. 4, p. 325:)
“With reference to the character or quality of the land reserved by the treaties for the Indians, I can only speak from personal observation with regard to those selected in the southern portion of the State. They are such as only a half-starved and defenceless people would have consented to receive,

and, as a general thing, they embrace only such lands as are unfit for mining or agricultural purposes." And Commissioner McKee (S. Doc. 4, p. 249,) says: "In my judgment there are not more than two or three out of the whole number of reservations which any practical man or company would purchase, *as a whole*, at even one cent per acre, subject to State and county taxes. Still, we had endeavored to include in every such selection some good lands capable of subsisting the Indians; and it would have been a wretched policy, as well as gross injustice, to have done otherwise. Our object had been to give them lands which they could work, and upon the product subsist, after two or three years, during which the government would aid them by supplies of food, clothing," &c.

The effect of the removal of the Indians on to the reservations was to put an end to the strife in the Indian country, which threatened a general Indian war, and to secure to the miners the peaceable possession of extensive and valuable mining districts. Mr. Johnston says of the Indians, Dec. 3, 1851, (S. Doc. 61, p. 12:) "Those with whom treaties have been entered into, residing in any agency upon the San Joaquin, Fresno, Merced, and Tuolumne and Stanislaus rivers, have been seemingly quiet and contented since I have been supplying them with food." And Commissioner Barbour says of the same Indians: "They occupied the country about the headwaters of the Tuolumne, Merced, and Mariposa rivers, embracing some of the richest gold mines of the State, from the most of which they had driven the miners, killing many of them, and having driven off and destroyed a large number of horses, mules, and beef cattle. By the terms of the treaty they surrendered all claims to this extensive rich mineral region, and accepted a tract of country allotted to them between the Tuolumne and Merced rivers, to which they removed shortly after the treaty, and where they were living quietly and contentedly, and doing well when I last saw them in the month of September, 1851." And of the Indians treated with April 29, 1851, he says, (S. Doc. 4, p. 252: "The Indians treated with on this occasion inhabited the country on the Mariposa, Chouchilla, Fresno, Upper San Joaquin, and King's rivers, embracing a very large extent of the very richest gold region in the State, from which they had driven the miners, after killing many of them, and destroying their property. They, by this treaty, surrendered their title to hundreds of miles of country rich in gold, and accepted a district of country specified in the treaty sufficient for their purposes, and well adapted to their wants. Shortly after the treaty they all removed to and settled in the district of country allotted to them, and were working industriously, doing well, and living contentedly in their new home when I left them in September last," (1851.) Mr. Wozencraft says, December 1, 1851, (S. Doc. 4, p. 229:) "The Indians throughout my district are quiet and peaceable." And again, May 29, 1852: "The Indians throughout my district are quiet and peaceable, except some few thefts;" and (S. Doc. 61, p. 24) gives Dr. Rejois' statement: "The Indians in good faith have come from the mountains, given up their mines and hunting grounds to the miners, and are desirous of learning from the white man the customs of civilized life."

By Senate Document 4, pp. 268, 326, it appears that the treaties made by the commissioners were submitted by the Commissioner of Indian Affairs to Lieutenant Edward F. Beale, with directions to report "his views as to the merits" of the treaties. In his report he says: "With reference to my views as to the merits of the treaties, I state that I regard the general line of policy pursued by the commissioners and agents in negotiating with the Indians as proper and expedient under the circumstances. My own personal knowledge and experience in Indian affairs, and particularly in reference to the tribes within the State of California, incline me to the opinion that to secure their peace and friendship no other course of policy, however studied and labored it may have been, could have so readily and effectually secured the object in view."

But it is observable that this commendation applies only to the general line of policy adopted by the commissioners, viz: the removal of the Indians to reservations, and their temporary supply there with subsistence; and it is not to be extended to the terms of any particular contract for supplies or the circumstances of its execution.—(S. Doc. 57, p. 2; S. Doc. 4, p. 366.)

Congress appropriated by act September 30, 1850, (Stat. at L., 9 vol., p. 558, c. 91,) to enable the President to hold treaties with the various Indian tribes in the State of California, twenty-five thousand dollars. And by the act of February 27, 1851, (Stat. at L., 9 vol., p. 572, c. 12,) "For expense of holding treaties with the various tribes of Indians in California, in addition to the appropriation of the thirtieth of September, eighteen hundred and fifty, twenty-five thousand dollars."

The amount of these appropriations (fifty thousand dollars) was by the acts themselves applicable to *the holding* of treaties, and to no other purpose. It had no reference to expenditures incurred in the fulfilment of treaty stipulations, and was not therefore applicable to the contracts claimed upon; and the commissioners were instructed by the department in its despatch of June 25, 1851, (S. Doc. 4, p. 17,) which informed them of the remittance of the appropriation last made, that articles deliverable under the treaties must be provided for by future appropriations.

By instructions from the department, dated June 27, 1851, (S. Doc. 4, pp. 17, 18,) the commissioners were informed that the amount of the appropriation stated above (\$50,000) was all that was applicable to *the negotiation* of treaties in California, and were instructed, "when the funds referred to have been exhausted you will close *negotiations*, and proceed with the discharge of your duties as agents simply, as the department could not feel justified in authorizing anticipated expenditures beyond the amount of appropriations made by Congress."

These instructions prohibited the commissioners from negotiating or entering into treaties after the appropriations were exhausted, but they had no reference whatever to the action of the commissioners under treaties made before the appropriations were exhausted.

All the treaties made by the commissioners were rejected by the Senate.

The statute of August 30, 1852, (10 Stat. at L., p. 56,) appropriated: "For the preservation of peace with those Indians who have

been dispossessed of their lands in California until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars. *Provided*, That nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the Indians who have been dispossessed of their lands in California."

And by the act of March 3, 1853, the President was authorized to make five military reservations from the public domain in the State of California, and the sum of two hundred and fifty thousand dollars was appropriated to defray the expense of subsisting Indians in California, and removing them *to said reservations* for protection.

And the annual appropriation acts of 1854-'5-'6-'7-'8, contained similar provisions for concluding the removal and continuing the subsistence of the Indians.

The petitioner claims, that under a contract made February 10, 1852, between one Wozencraft, commissioner and Indian agent on the part of the United States, he (the petitioner) sold to the United States nineteen hundred head of beef cattle, to be delivered between the Mokenlumne river and the Four rivers when and as the same should be required by said Wozencraft, at the price of fifteen cents per pound, to be paid in bills drawn by Wozencraft upon the Secretary of the Interior.

And the petitioner avers in his petition that he delivered the said nineteen hundred head of cattle, weighing 883,333 $\frac{1}{3}$ lbs., which, at the contract price, amounted to the sum of one hundred and thirty-two thousand and five hundred dollars; that said Wozencraft gave him the seven drafts or bills drawn on the Secretary of the Interior, and which are specified in the petition, and amounted to the said sum of \$132,500; that the bills were presented to the Secretary of the Interior for payment, and were protested for non-acceptance and non-payment in the month of March, 1852, and the bills are now in the possession of the petitioner, and exhibited in the case.

The petitioner claims on the contract of sale and for the cattle delivered, and not on the bills or drafts. A paper purporting to be the contract, and referred to in the petition as Exhibit A, was produced, but proof of its execution was not made; it is annexed, and marked Exhibit A.

But O. M. Wozencraft, in his deposition taken in Washington March 24, 1856, in his answer to the 10th direct interrogatory, states: "I caused supplies of beef to be purchased of Samuel J. Hensley for various tribes of Indians in the San Joaquin valley. The quantity was nineteen hundred head of cattle, averaging in weight five hundred pounds each, at fifteen cents per pound."

By this statement the weight of the cattle delivered was 950,000 pounds, and the price \$142,500, or \$10,000 more than the sum alleged in the petition to be due, or the amount of the bills exhibited in the case.

But in the "vouchers" enclosed to the department by O. M. Wozencraft, September 18, 1852, are his certificate (dated 11th of February, 1852,) of the correctness of Hensley's bills against the United States for 1,900 head of cattle "furnished Indians," &c., of 500

pounds weight each, \$142,500, and Hensley's receipt (dated February 11, 1852,) for drafts for \$142,000. The discrepancy in the amount claimed in the petition and in the evidence is not accounted for otherwise than by the fact appearing on the petition that it was not signed by Mr. Hensley, but by his original counsel in the case.

In the argument for the petitioner at this term of the court it is contended that under the contract made by Hensley and Wozencraft there were delivered to Wozencraft 1,285 head of cattle, and to Lieutenant Beale, superintendent, 438 head, making in all 1,713 head of cattle, averaging 500 pounds in weight, which, at fifteen cents per pound, amounted to \$128,475.

The delivery of 1,285 head of cattle to Wozencraft is testified to by M. B. Lewis, J. J. Visonhaller, and Lewis Leach, deponents for the petitioner, as made in May, 1852, to Major Savage, sub-Indian agent, and acting for Wozencraft; and these deponents all testify that the cattle delivered to Savage were slaughtered and distributed to the Indians, and declare that they are "familiar" with the matter of the distribution, and they thus swore positively to the slaughter and distribution of 1,285 head.

But it appears by the deposition of Lieutenant Beale, taken for the United States, that he received November 30, 1852, from O. M. Wozencraft, an order on Visonhaller for 212 head of cattle, and that he subsequently collected 212 head as left on hand or supposed to be lost out of the 1,285. There is nothing in the case from which it can be inferred that the disposition by Lieutenant Beale of these 212 ever came to the knowledge of either Lewis, Visonhaller, or Leach; yet the 212 were included in and made a part of the 1,285 head they testify were slaughtered and distributed to the Indians, and their inaccuracy in this respect weighs against their testimony where opposed by other evidence.

Then, as to the 408 head of cattle alleged to have been delivered to Lieutenant Beale, these deponents for the petitioner all swear to the delivery in the spring of 1853; but in what way they knew the fact or ascertained the number is not shown, for they were not cross-examined on these points or any other, and Lieutenant Beale in his deposition makes no mention of any such delivery to him, and mentions only the receipt of 212 head, collected by him as above stated, although he answers under the broad interrogatory (5th): State if you know anything connected with the claim of Major Hensley against the United States for cattle supplied to the Indians in California; and if yea, what it was.

Lieutenant Beale says in his deposition: "From all that I could learn when I was in California as superintendent of Indian affairs I have every reason to believe that the claim of Major Hensley against the United States is a just one." But there is no evidence in the case that Lieutenant Beale knew of any claim of Major Hensley's, beyond that specified in the account he annexed to his deposition, as received from Visonhaller, for 1,285 head of cattle. And Lieutenant Beale's deposition is not an official report, and his *opinion* is not evidence here, whatever weight it may be entitled to elsewhere. As a witness his only authority was to state *facts* as distinguished from *opinions*.

Mr. Wozencraft, in his deposition, testifies to the delivery of the whole nineteen hundred head of cattle, but his statements, when collated with his answers to Lieutenant Beale, set forth in Doc. 4, p. 368, appear to be made without personal knowledge of the facts.

We are of opinion that the evidence, when allowed all its proper force, shows the delivery under the contract of only 1,285 head.

S. Doc. 4, p. 389, shows that Lieutenant Beale, November 30, 1852, received an order on Samuel Hensley for 612 head of government cattle, and (S. Doc. 4, p. 405, November 20, 1852,) Mr. Wozencraft speaks of them as then "in charge of Major Hensley." There is no evidence in the case that any of these were received by Lieutenant Beale; and that they were not is the inference, from the fact that Lieutenant Beale, in his deposition taken in September, 1856, mentions the 212 head of cattle collected by him, and referred to in the order given on Visonhaller at the same time with the order on Hensley, and makes no mention of this latter order or any receipt under it.

The statement of Joel H. Burkes (S. Doc. 57, p. 5) is not shown, and does not appear to attach to the cattle sold by Major Hensley.

As to the weight of the cattle sold by the pound, there is no evidence that they were actually weighed, and the testimony in the case (S. Doc. 61, p. 17) shows that the custom of the country was to take the estimate of persons on the ground. Five hundred pounds seems to have been fixed upon as the average weight of the cattle sold in California.

The price of fifteen cents per pound is shown to have been a reasonable price at the time by the deponents for the petitioner in this case, and by the documents in evidence, (S. Doc. 61, p. 17; S. Doc. 4, pp. 16, 17, 18.)

It is shown in Senate Doc. 4, pp. 95, 96, that the treaty with these Indians, for whose supply the contract in this case was entered into, was made and concluded April 9, 1851, and the terms of the treaty as to supplies of food for the Indians in 1851 and 1852, are there mentioned.

It is claimed that the United States are bound to pay for the 212 head of cattle collected and received by Lieutenant Beale. The reasons and the mode of the action of Lieutenant Beale are shown in Senate Doc. 4, p. 367; and in his receipt for the cattle, p. 359, he states: "All of the above to be held by me, subject to the decision of the department." What that decision was is not shown. There is no evidence that these cattle were ever returned to Mr. Hensley, or paid for by the United States. But the United States cannot be charged by the acts of its officers not within the line of their duty, and there is no evidence that Lieutenant Beale or the department were authorized to make purchases for the Indians *on the credit* of the United States, or to adopt or approve contracts so made.

We are of opinion that the case must be decided on considerations common to the class of cases to which it has been said it belongs, and irrespective of its peculiar circumstances or merit; and that in this case, as in each of its class, the question is whether the contract claimed upon is the contract of the United States, as made or adopted by their authority.

The whole authority of the commissioners *as such* was "to hold treaties with various Indian tribes in the State of California," and the

meaning of "the terms *to hold treaties*" is clearly defined and precisely limited by the provisions of the constitution and the uniform practice under it, by which the executive is authorized to mould the terms of treaties, while the consent of the Senate is necessary to give them the sanction of law, authorizing action under them. It is entirely clear upon the evidence that the contracts claimed upon were made, and the supplies claimed under the contracts were furnished months after the treaties to which they are referred had been agreed upon and reduced to writing and signed, and their formal execution as mere documents completed; and with such execution the holding of the treaties was necessarily and entirely fulfilled, and the functions of the commissioners under the terms of their commission were determined, and for any further action on their part there was no authority in the words of their commission.

It was claimed that the treaties could not have been held or made without stipulations for these supplies of provisions in aid of the subsistence of the Indians. But the evidence does not show this; on the other hand, it tends to show that the Indians were willing to enter into treaties, but were unwilling to remove from their homes into the reservations, and it was only their removal which made the stipulations of the supplies necessary. In the report of the commissioners dated March 28, 1851, (S. Doc. 4, pp. 69, 70,) in describing the course of their negotiations with the Indians, they state: "When we again met them they expressed themselves satisfied with the terms we offered, except their removal from their mountain fastnesses to the plains immediately at the foot of the mountains. We then explained to them the necessity of such a removal and location, and that we could treat with them on no other condition, believing that, if they were permitted to remain in the mountains, constant conflicts between the Indians and whites would take place." This official report, made at the time of the transactions, is the best evidence of their circumstances and purpose. Besides, this removal of the Indians on to reservations was the policy of the commissioners agreed upon and adopted on consultation by them before negotiating with the Indians, and before they entered the Indian country.—(S. Doc. 4, pp. 50, 60, 63; Doc. 61, p. 2.) And it was suggested to the department by Commissioner McKee, (Doc. 4, p. 53,) as early as December 1, 1850, and more than three months before any treaty was made or proffered. And all this tends to show that the removal of the Indians to the reservations was a condition enforced upon them by the commissioners, and that with the Indians it was not a requirement, but an objection, in the treaties made.

Then it is said that the department approved the policy of the commissioners in removing the Indians to the reservations, and thereby adopted the act and its direct consequence of furnishing them with provisions there.—(Doc. 4, pp. 15, 20.) And thus, the question is, whether it was in the power of the executive, under all the circumstances of the case, to authorize or adopt these contracts.

Under the clause in the Constitution which authorizes the President to make treaties, the power of the President is like that of the commissioners here, to *hold treaties* only, and the Executive, therefore, had no more authority than the commissioners to carry those treaties into

execution before their ratification by the advice and consent of the Senate.

The circumstances of the case are claimed to be, that a strife, destructive of life and property and threatening the peace of the country, was raging in the State of California, and the question is whether to end this strife by separating the parties to it, the Executive could use the means these commissioners used, *of pledging the credit of the United States*.

The Constitution gives to the Executive no such power in terms, and the provisions and purpose of the Constitution preclude its implication. The power in the Executive to pledge the credit of the country would render nugatory the provision of the Constitution that "no money shall be drawn from the treasury but in consequence of appropriations made by law," and would baffle the extended purposes of that provision. The power, if implied to any degree, must be to every degree, and would place the resources of the country at the disposal of the Executive, and this would change the operation of the government which the Constitution expressly makes. Admitting, therefore, all the plaintiffs claim, that the department charged with the management of Indian affairs approved the policy of the commissioners, and adopted its consequences, yet that gave to the commissioners no power to pledge the credit of the United States; such a power belongs exclusively to the Congress of the United States.

But the commissioners were also Indian agents, and it is claimed that the power to make these contracts was, under the circumstances, within their official authority as Indian agents.

The statute of the United States, June 30, 1834, (Stat. at L., vol. 4, p. 757, sec. 7,) enacts as follows: "And it shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law, to obey all legal instructions given to them by the Secretary of War, the Commissioner of Indian Affairs, or the superintendant of Indian affairs, and to carry into effect such regulations as may be presented by the President."

The general terms "to manage and superintend the intercourse with the Indians," &c., cannot in this statute be construed to involve the power to make any purchases for or on account of the Indians, because that subject is specifically provided for, in all cases contemplated by the statute, in the 13th section, which appoints specific agencies for the purpose of making purchases, and, to guard against frauds, makes express and careful provisions for the delivery of all articles purchased; and these specific agencies, and the plain purposes of the 13th section, would be rendered nugatory by construing that the power to make purchases and distribute articles purchased was involved in the general terms of the 7th section, to "manage and superintend intercourse with the Indians."

It may be that the cases in which these contracts were made were not contemplated in the 13th section, and that therefore they may not be directly within its provisions; but there is nothing to show that they were contemplated in the 7th section. And if the general terms, "manage and superintend intercourse with the Indians," do not in-

clude power to make purchases for the Indians in cases contemplated in the statute, they cannot be construed, of their own force, to involve such power in cases not contemplated by the statute.

By the remaining clause of the 7th section, the agents and sub-agents are "to obey all legal instructions given to them by the Secretary of War, the Commissioner of Indian Affairs, or the superintendent of Indian affairs, and to carry into effect such regulations as may be prescribed by the President." But if there is no power in the Executive to pledge or dispose of the credit of the United States, no regulations or instructions from any of the executive officers mentioned in this section of the statute, and no rules of the Indian bureau could authorize agents or sub-agents to make these contracts.

It is claimed that the contract in this case has been affirmed by Congress, and appropriations made for its payment, in the act of August 30, 1852, and subsequent appropriation acts.

In the act of 1852, all that relates to California is in these words:

"For the preservation of peace with the Indians who have been dispossessed of their lands in California, until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars: *Provided*, That nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the Indians who have been dispossessed of their land in California."

The argument for the petitioner is, that this statute was intended to provide for obligations of the United States, "to feed and support the Indians in 1852;" the proviso expressly declares, no such obligation shall be implied from the act. Then the statute denotes in terms the period to which its appropriation is to be applied. It speaks of course from its date, August 30, 1852, and says its provision is for the preservation of peace *until* the *future* settlement of the Indians, and is thus on its face prospective merely.

The act of 1853 authorized *new reservations* for the Indians, and then provided means for their removal to these new reservations, and for their subsistence there; and the subsequent acts are all expressly in continuance of the same measures. And from all the acts, and the evidence in the case, the conclusion is, that the United States rejected the treaties and repudiated the reservations and measures of the commissioners, and substituted other reservations and measures, and provided for them and for them only.

Then it is said that the United States have surveyed and assumed title over the lands ceded by the Indians in the treaties made by the commissioners, and thus substantially affirmed the treaties. It is enough to say, that it is a part of the case that all those treaties were rejected by the Senate, and never came into existence as a means of title or of claim of title; and whatever may have been the action of the United States, there is no reason shown for referring it to any claim of title founded on those rejected treaties.

It was argued for the petitioner that the relation of the United States to the Indians was analogous to that of guardian and ward at the common law, and that the supplies furnished to the Indians were thus in performance of legal obligations of the United States. If the analogy

could be sustained, the argument founded on it was answered at the bar, that the obligation of a guardian was only to apply the ward's means to his support, and not to furnish means. But the analogy does not exist, for the relation of guardian and ward is a personal relation and cannot exist between nations, whose relations are by treaty and compact between themselves. The liability of a guardian for his ward's support rests on the fact that he holds all the ward's means of support. But the United States were not entitled to the rents or profits of the lands, or the goods and chattels of the Indian tribes or nations in California.

And upon the whole case we are of opinion that the United States are not legally liable upon the contract claimed upon, because it was not made by their authority, and has not been adopted by them.

Our decision is, that the petitioner has not established a title to the relief he prays for.

CHARLES V. STUART.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

CHARLES V. STUART *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Depositions filed in the case, and numbered 1, 2, and 3, transmitted to the House of Representatives.
3. Claimant's manuscript brief, transmitted to the House of Representatives.
4. United States Solicitor's brief.
5. Opinion of the Court, adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said Court, at Washington, this third day of February, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

To the Judges of the Court of Claims of the United States of America, established by the act of Congress approved 24th of February, in the year 1855.

The petition of Charles V. Stuart, a citizen of the State of California, and residing at San Francisco, in the said State, respectfully represents to this honorable Court:

That on the 8th day of January, 1855, your petitioner became the

assignee of a claim against the government of the United States for the sum of \$7,826 06, by reason of having purchased the same in the spring of the year 1853 for a full and valuable consideration, and that your petitioner is the sole and only owner of such claim.

That the claim in question arose as follows: Adam Johnston, sub-Indian agent of the United States, appointed for the State of California, on the 13th April, 1849, made a verbal contract with George G. Belt & Co., merchants and licensed traders in the Indian country, for the supply of beef and other provisions to the Indians of the San Joaquin valley and Tuolumne and Merced rivers; such contract was made in view of the absolute necessity of the case, and in the confident belief that the department had the power to order its payment.

Owing to the exigencies of the service, caused by the large number of Indians being at the aforesaid places, and in a starving condition, the Indian agent considered it his duty to supply them with food in preference to making them gaudy or showy presents, although the latter would have been more pleasing to the eye for them; yet, without food or the means of subsistence, they would, as a matter of necessity, have obtained food by theft, and which would inevitably have resulted in scenes of bloodshed and murder, and have seriously interfered with the prospect of effecting any treaties with them, or of carrying out the humane views and intentions of the United States government towards them; and here your petitioner would respectfully suggest that Mr. Johnston acted with great prudence in the matter by distributing the provisions thus obtained from the merchants before mentioned in rations suitable for immediate use, rather than deliver the Indians cattle, which might, and in so many instances did, stray away, thus depriving the Indian of the benefits resulting from the generosity of the United States government.

Your petitioner further shows that the distribution of provisions by the agent to the Indians commenced early in 1851, and continued up to January, 1852, inclusive, and of which the office of Indian affairs had full and immediate notice, as more fully appears by the letter of the agent, dated 24th June, 1851, and printed in part 3 Annual Message and Accompanying Documents, 1851 and 1852, pages 513, 514, to which your petitioner begs respectfully to refer, and in which the sub-agent asks for advice as to the course pursued by him. The reply to which was a communication from the department, under date of 12th August, 1851, to Adam Johnston, the sub-agent, approving his course, and will be found in exhibit marked A, being an extract from said communication; a perusal of which will satisfy your honorable Court that the sub-Indian agent in this matter exercised a sound discretion, and that he had no reason to doubt but that Congress would make an appropriation to discharge all the liabilities incurred by him with said traders; as without the food thus distributed the Indians must have literally starved, and the object of the United States in extinguishing the Indian right of occupancy to the lands in the neighborhood before mentioned wholly frustrated. Add to which, the sub-Indian agent considered that his duty to his government under his appointment was to protect and feed the Indians over whom the United States claimed the right to have jurisdiction.

Your petitioner further avers that the said Messrs. George G. Belt & Co. furnished the provisions to the sub-agent, Adam Johnston, in good faith, believing that he had full power and authority to make the contract, and that the provisions thus supplied to the United States would be promptly paid for whenever the accounts for the same were duly presented to the proper authorities for that purpose.

That the said George G. Belt & Co. furnished the said Adam Johnston, for distribution among the Indians, provisions, consisting of beef, flour, beans, &c., to the amount of \$9,450 31, on account of which was paid \$1,624 25, leaving a balance due by the United States of \$7,826 06, the particulars of which are annexed, and marked exhibits from 1 to 5, inclusive, being the receipts of Adam Johnston, esq., the sub-Indian agent, for the said supplies.

Your petitioner further states that the prices of the various articles furnished as aforesaid by Belt & Co. were all under the market price at which articles of similar quality were selling to the whites in the very neighborhood where these provisions were distributed; that their distribution was the means of preventing the Indians from robbing and murdering the whites; that the said Belt & Co. had the utmost confidence in the officers sent by the government to treat with the Indians, and never doubted for a moment their right to contract debts for supplies—a confidence in which your petitioner most fully participated.

Your petitioner, therefore, prays that the Solicitor of the United States, appointed to represent the government before this honorable Court, may be required to answer to this petition, and that such proceedings may be had thereon as justice and equity require; and that on the final hearing this Court will grant to your petitioner such relief as his case merits.

CHARLES V. STUART.

City and County of San Francisco, ss:

Charles V. Stuart, of the city of San Francisco, being duly sworn, deposes and says, that he has read the foregoing petition, and that the matters therein stated are true, to the best of his knowledge and belief, and that he is the said assignee of said claim for a full and valuable consideration.

CHARLES V. STUART.

Subscribed and sworn to before me this day, 10th November, 1855.

WM. C. PARKER, *Notary Public.*

[Exhibit No. 1.]

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of Messrs. Belt & Co. two thousand nine hundred and ten pounds of beef, at twelve and a half cents per pound; six hundred pounds of flour, at fourteen cents per pound; sixty pounds of beans, at twenty cents per pound, and seventy-one pounds of bread, at

twenty cents per pound; delivered to a party of Stanislaus Indians and a party of the Four Creeks Indians whilst on a visit to this reservation, as per verbal orders, from August 5 till September 29, inclusive. The amount being four hundred and sixty-two dollars and eighty-one cents, which is to be paid out of the first appropriation by the government for such purposes.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

[Exhibit No. 2.]

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of George G. Belt & Co. twelve thousand and one hundred pounds of beef, at fourteen cents per pound, and three thousand four hundred and fifty pounds of flour, at sixteen cents per pound; delivered to the Indians on the Mercedes and Tuolumne rivers, as per contract, from September 29 to October 24, inclusive. The amount being twenty-two hundred and forty-six dollars, which is to be paid out of the first appropriation by the government for such purposes.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

[Exhibit No. 3.]

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of George G. Belt & Co. fourteen thousand seven hundred and nine pounds of beef, at fourteen cents per pound, and three thousand four hundred and fifty of flour, at sixteen cents per pound; delivered to the Indians on the Mercedes and Tuolumne rivers, as per contract, from November 2 to November 30, inclusive. The amount being two thousand six hundred and eleven dollars and twenty-six cents, which is to be paid out of the first appropriation by the government for such purposes.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

[Exhibit No. 4.]

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of George G. Belt & Co. fifteen thousand three hundred and seven pounds of beef, at fourteen cents per pound, and four thou-

sand two hundred and fifty pounds of flour, at sixteen cents per pound; delivered to the Indians on the Mercedes and Tuolumne rivers, as per contract, from December 1 to December 31, inclusive. The amount being twenty-eight hundred and twenty-two dollars and ninety-eight cents, which is to be paid out of the first appropriation by the government for such purposes, less sixteen hundred and twenty-four dollars and twenty-five cents, being the amount of two bills of government property sold to Messrs. Belt & Co., and credited upon the account appended to this voucher or receipt, which is hereby reduced to the sum of eleven hundred and ninety-eight dollars and seventy-three cents, to be paid out of said appropriation.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

[Exhibit No. 5.]

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of George G. Belt & Co. seven thousand five hundred and nine pounds of beef, at fourteen cents per pound, and sixteen hundred pounds of flour, at sixteen cents per pound; delivered to the Indians upon the Mercedes and Tuolumne reservations, as per contract, from the 1st to 31st January, inclusive, in the year 1852. The amount being thirteen hundred and seven dollars and twenty-six cents, which is to be paid out of the first appropriation made by the government of the United States for such purposes.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

[Exhibit A.]

Extract of a letter from Charles E. Mix, Acting Commissioner ad interim, addressed to Adam Johnston, Indian sub-agent for Indians, California.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, August 12, 1851.

"SIR: Your letter of 25th June, 1851, giving an account of your proceedings as sub-agent for the Indians in San Joaquin valley for three months preceding that date, has been received.

"The motives which prompted you to furnish additional subsistence to the Indians, and to employ a physician to vaccinate them and prescribe for the diseased among them, are duly appreciated by this office; and as there are no appropriations now applicable for such expenditures the department will recommend the subject to the favorable consideration of Congress, that such action may be had by that body as shall provide for them."

[Exhibit No. 1.]

United States Indian department, per Colonel Adam Johnston, Indian agent, to Messrs. Belt & Co., Dr., for sundries furnished a party of Stanislaus Indians and a party of the Four Creeks Indians while on a visit to this reservation, as per verbal order, and as follows:

August 5, 1851. To beef, per Four Creeks Indians, 1,482 pounds, at 12½ cents	\$185 25
August 5, 1851. To flour, per Four Creeks Indians, 300 pounds, at 14 cents.....	42 00
August 5, 1851. To beans, per Four Creeks Indians, 40 pounds, at 20 cents.....	8 00
August 5, 1851. To bread, per Four Creeks Indians, 41 pounds, at 20 cents.....	8 20
September 29, 1851. To beef, Stanislaus Indians, 1,428 pounds, at 12½ cents	171 36
September 29, 1851. To flour, Stanislaus Indians, 300 pounds, at 14 cents.....	42 00
September 29, 1851. To beans, Stanislaus Indians, 20 pounds, at 20 cents.....	4 00
September 29, 1851. To bread, Stanislaus Indians, 30 pounds, at 20 cents.....	6 00
	462 81

MERCEDES RESERVATION,
December 31, 1851.

Received of A. Johnston, United States Indian agent, a receipt, payable on an appropriation being made by the government of the United States for such purposes.

GEORGE G. BELT & CO.

We, Messrs. Belt & Co., the firm within mentioned, hereby assign and transfer the within account and receipt to Charles V. Stuart, of San Francisco, and authorize him to collect and receive the same to his own use and benefit. Witness our hands and seals this eighth day of January, A. D. 1855.

BELT & CO. [L. s.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the foregoing assignment, and acknowledged to me that he executed the same, as one of the firm of Belt & Co., above named, and as the free

and voluntary act and deed of the firm of Belt & Co., therein described, for the uses and purposes therein mentioned.

In witness I have hereunto set my hand and official seal on the day
[L. s.] and in the county aforesaid.

CHARLES HALSEY,
Notary Public, &c.

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of Messrs. Belt & Co. two thousand nine hundred and ten pounds of beef, at twelve and a half cents per pound; six hundred pounds of flour, at fourteen cents per pound; sixty pounds of beans, at twenty cents per pound, and seventy-one pounds of bread, at twenty cents per pound; delivered to a party of Stanislaus Indians and a party of the Four Creeks Indians whilst on a visit to this reservation, as per verbal order, from August 5 to September 29, inclusive. The amount being four hundred and sixty-two dollars and eighty-one cents, which is to be paid out of the first appropriation by the government for such purposes.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

We, the firm mentioned in the within receipt and the annexed account, do hereby assign and transfer the said account to Charles V. Stuart, of the city of San Francisco, and authorize him to collect and receive the amount thereof to his own use and benefit. Witness our hands and seals this eighth day of January, A. D. 1855.

BELT & CO. [L. s.]

STATE OF CALIFORNIA, }
County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the foregoing assignment, and acknowledged to me that he executed the same, as one of the firm of Belt & Co., above named, and as the free and voluntary act and deed of the firm of Belt & Co., therein described.

In witness whereof, I have hereunto set my hand and official seal on
[L. s.] the day and in the county aforesaid.

CHARLES HALSEY,
Notary Public, &c.

[Exhibit No. 2.]

CHARLES V. STUART *vs.* THE UNITED STATES.—W. HART, Comm'r.

United States Indian department, per Col. Adam Johnston, Indian agent, to George G. Belt & Co., Dr., for beef and flour delivered to the Merced and Tuolumne Indians, as per contract and agreement, from the 29th of September to date, at times and in quantities as follows:

1851.		DR.		
Sept. 29	To Mercedes Indians,	1,960 lbs. beef.		
Oct. 8	-----do-----	1,840-----do.		
16	-----do-----	1,970-----do.		
24	-----do-----	1,930-----do.		
		7,700 lbs., at 14 cts.	\$1,078 00	
Sept. 29	-----do-----	450 lbs. flour.		
Oct. 8	-----do-----	500-----do.		
16	-----do-----	450-----do.		
24	-----do-----	400-----do.		
		1,800 lbs., at 16 cts.	288 00	
				\$1,366 00
Sept. 29	To Tuolumne Indians,	960 lbs. beef.		
Oct. 8	-----do-----	1,040-----do.		
16	-----do-----	1,220-----do.		
24	-----do-----	1,180-----do.		
		4,400 lbs., at 14 cts.	616 00	
Sept. 29	-----do-----	400 lbs. flour.		
Oct. 8	-----do-----	400-----do.		
16	-----do-----	450-----do.		
24	-----do-----	400-----do.		
		1,650 lbs., at 16 cts.	264 00	
				880 00
				2,246 00

Received of A. Johnston, United States Indian agent, for the above amount, a receipt, payable on an appropriation being made by the government of the United States for such purposes.

GEORGE G. BELT & CO.

We, George G. Belt & Co., the firm mentioned in the within account and receipt, hereby assign and transfer the same to Charles V. Stuart, of the city of San Francisco, and authorize him to collect and receive the same to his own use and benefit. Witness our hands and seals this eighth day of January, A. D. 1855.

G. G. BELT & CO. [L. s.]

STATE OF CALIFORNIA, }
 City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person described in and who executed the foregoing assignment, and acknowledged to me that

he executed the same as one of the firm of Belt & Co., and as the free and voluntary act and deed of George G. Belt & Co., therein described, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal
[L. s.] on the day and in the county aforesaid.

CHARLES HALSEY,
Notary Public.

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of Geo. G. Belt & Co., twelve thousand and one hundred pounds of beef, at fourteen cents per pound, and three thousand four hundred and fifty pounds of flour, at sixteen cents per pound; delivered to the Indians on the Mercedes and Tuolumne rivers, as per contract, from September 29 to October 24, inclusive.

The amount being twenty-two hundred and forty-six dollars, which is to be paid out of the first appropriation by the government for such purposes.

[L. s.]

ADAM JOHNSTON,
U. S. Indian Agent, Valley of San Joaquin.

We, George G. Belt & Co., the firm mentioned in the foregoing account and receipt, hereby assign and transfer the same to Charles V. Stuart, of the city of San Francisco, and authorize him to collect and receive the same to his own use and benefit.

Witness our hands and seals this eighth day of January, A. D. 1855.

GEO. G. BELT & CO. [L. s.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the within assignment, and acknowledged to me that he executed the same freely and voluntarily as the act and deed of George G. Belt & Co., the firm therein mentioned, and for the uses and purposes therein mentioned.

[L. s.] In witness whereof, I have hereunto set my hand and official seal on the day and in the county aforesaid.

CHARLES HALSEY,
Notary Public, &c.

[Exhibit No. 3.]

STUART vs. THE UNITED STATES.—W. HART, Com'r.

*United States Indian department, per Col. Adam Johnston, Indian agent,
to Belt & Co., Dr.*

For beef and flour furnished the Mercedes and Tuolumne Indians during the month of November, as per contract, at times and in quantities as follows:

1851.		Dr.	
November	2	To beef per Mercedes Indians,	1,950 pounds.
	9	-----do-----do-----	1,906 pounds.
	16	-----do-----do-----	1,784 pounds.
	23	-----do-----do-----	1,847 pounds.
	30	-----do-----do-----	1,860 pounds.
		-----	9,347 lbs., at 14 cents...
			\$1,308 58
	3	To flour-----do-----	500 pounds.
	10	-----do-----do-----	450 pounds.
	17	-----do-----do-----	400 pounds.
	24	-----do-----do-----	450 pounds.
		-----	1,800 lbs., at 16 cents...
			288 00
	5	To beef per Tuolumne Indians,	1,360 pounds.
	12	-----do-----do-----	1,402 pounds.
	19	-----do-----do-----	1,370 pounds.
	26	-----do-----do-----	1,230 pounds.
		-----	5,362 lbs., at 14 cents...
			750 68
	5	To flour-----do-----	450 pounds.
	12	-----do-----do-----	400 pounds.
	19	-----do-----do-----	400 pounds.
	26	-----do-----do-----	400 pounds.
		-----	1,650 lbs., at 16 cents...
			264 00
			2,611 26

MERCEDES RESERVATION, *December 1, 1851.*

Received of A. Johnston, United States Indian agent, for the above amount, a receipt, payable on an appropriation being made by the government of the United States for such purposes.

G. G. BELT & CO.

We, Messrs. Belt & Co., the firm named in the foregoing account and receipt, hereby assign and set over the same to Charles V. Stuart, of San Francisco, and authorize him to collect the same to his own use and benefit. Witness our hands and seals this eighth day of January, A. D. 1855.

BELT & CO. [L. s.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the

within assignment, and acknowledged to me that he executed the same as one of the firm of Belt & Co., above named, and as the free and voluntary act and deed of the firm of Belt & Co., therein described, for the uses and purposes therein mentioned.

[L. s.] In witness whereof, I have hereunto set my hand and official seal in the county and on the day aforesaid.

CHARLES HALSEY,
Notary Public, &c.

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of George G. Belt & Co. fourteen thousand seven hundred and nine pounds of beef, at fourteen cents per pound, and three thousand four hundred and fifty of flour, at sixteen cents per pound; delivered to the Indians on the Mercedes and Tuolumne rivers, as per contract, from November 2 to November 30, inclusive. The amount being two thousand six hundred and eleven dollars and twenty-six cents, which is to be paid out of the first appropriation by the government for such purposes.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

We, George G. Belt & Co., the firm named in the foregoing account and receipt, hereby assign and transfer the same to Charles V. Stuart, of San Francisco, and authorize him to collect and receive the same to his own use and benefit. Witness our hands and seals this eighth day of January, A. D. 1855.

GEO. G. BELT & CO. [L. s.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the within assignment, and acknowledged to me that he executed the same as one of the firm of Belt & Co., and as the free and voluntary act and deed of George G. Belt & Co., the firm therein described, for the uses and purposes therein mentioned.

[L. s.] In witness whereof, I have hereunto set my hand and official seal on the day and in the county aforesaid.

CHARLES HALSEY,
Notary Public, &c.

[Exhibit No. 4.]

CHARLES V. STUART *vs.* THE UNITED STATES.—W. HART, Comm'r.

*United States Indian department, per Col. Adam Johnston, Indian agent,
to Messrs. Belt & Co., Dr.*

For beef and flour furnished the Mercedes and Tuolumne Indians during the month of December, as per contract, at times and in quantities as follows :

1851.		Dr.	
December 7	To beef per Mercedes Indians,	2,099	
14	-----do-----do-----	1,990	
21	-----do-----do-----	1,973	
30	-----do-----do-----	1,975	
		8,037 lbs., at 14 cents---	\$1,125 18
1	To flour -----do-----	500	
8	-----do-----do-----	450	
15	-----do-----do-----	450	
22	-----do-----do-----	400	
30	-----do-----do-----	400	
		2,200 lbs, at 16 cents---	352 00
3	To beef per Tuolumne Indians,	1,520	
10	-----do-----do-----	1,470	
17	-----do-----do-----	1,402	
24	-----do-----do-----	1,488	
31	-----do-----do-----	1,390	
		7,270 lbs., at 14 cents---	1,017 80
3	To flour -----do-----	450	
10	-----do-----do-----	400	
17	-----do-----do-----	400	
24	-----do-----do-----	450	
31	-----do-----do-----	350	
		2,050 lbs., at 16 cents---	328 00
			2,822 98
	Mercedes Reservation.—Less bill of property of December 31, 1851.		
	Marks & Stones-----	\$593 00	
	Reynolds and others-----	1,031 25	
			1,624 25
			1,198 73

Received of United States Indian Agent A. Johnson, for the above amount, a receipt, payable on an appropriation being made by the United States government for such purposes.

G. G. BELT & CO.

We, Messrs. Belt & Co., the firm mentioned in the within account and receipt, hereby assign and transfer the same to Charles V. Stuart, of the city of San Francisco, and authorize him to collect and receive the amount thereof to his own use and benefit.

Witness our hands and seals this eighth day of January, A. D. 1855.

G. G. BELT & CO. [L. s.]

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the foregoing assignment, and acknowledged to me that he executed the same as one of the firm of Belt & Co., and as the free and voluntary act and deed of the firm of George G. Belt & Co., therein described, for the uses and purposes therein described.

[L. s.] In witness whereof, I have hereunto set my hand and official seal on the day and in the county aforesaid.

CHARLES HALSEY,
Notary Public, &c.

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of George G. Belt & Co. fifteen thousand three hundred and seven pounds of beef, at fourteen cents per pound, and four thousand two hundred and fifty pounds of flour, at sixteen cents per pound; delivered to the Indians on the Mercedes and Tuolumne rivers, as per contract, from December 1 to December 31, inclusive.

The amount being twenty-eight hundred and twenty-two dollars and ninety-eight cents, which is to be paid out of the first appropriation by the government for such purpose, less sixteen hundred and twenty-four dollars and twenty-five cents, being the amount of two bills of government property sold to Messrs. Belt & Co. and credited upon the account appended to this voucher or receipt, which is thereby reduced to the sum of eleven hundred and ninety-eight dollars and seventy-three cents, to be paid out of said appropriation.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

We, George G. Belt & Co., within named, hereby assign and transfer the within account and receipt to Charles V. Stuart, of San Francisco, and authorize him to collect and receive the same to his own use and benefit. Witness our hands and seals this eighth day of January, A. D. 1855.

G. G. BELT & CO. [L. s.]

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the foregoing assignment, and acknowledged to me that he executed the same as one of the firm of Belt & Co., and as the free and voluntary act and deed of the firm of George G. Belt and Co. therein described.

[L. s.] In witness whereof, I have hereunto set my hand and official seal on the day and in the county aforesaid.

CHARLES HALSEY,
Notary Public, &c.

[Exhibit No. 5.]

CHARLES V. STUART *vs.* THE UNITED STATES.—W. HART, Comm'r.

United States Indian department, per Col. Adam Johnston, Indian agent, to Belt & Co., Dr., for beef and flour furnished the Mercedes and Tuolumne Indians during the month of January, 1852, as per contract, at times and in quantities as follows:

1852.	DR.			
Jan. 10	To beef for Mercedes Indians,	1,946		
23	-----do-----do-----	1,763		
			3,709 pounds, at 14 cts.	\$519 26
10	To flour-----do-----	400		
23	-----do-----do-----	350		
			750 pounds, at 16 cts.	120 00
12	To beef for Tuolumne Indians,	1,825		
27	-----do-----do-----	1,975		
			3,800 pounds, at 14 cts.	532 00
12	To flour-----do-----	400		
23	-----do-----do-----	450		
			850 pounds, at 16 cts.	136 00
				<u>1,307 26</u>

MERCEDES RESERVATION,
January 31, 1852.

Received of A. Johnston, United States Indian agent, for the above amount, a receipt, payable on an appropriation being made by the United States government for such purposes.

G. G. BELT & CO.

We, Messrs. Belt & Co., the firm named in the foregoing account and receipt, hereby assign and set over the same to Charles V. Stuart, of the city of San Francisco, and authorize him to collect and receive the same to his own use and benefit. Witness our hands and seals this eighth day of January, A. D. 1855.

BELT & CO. [L. s.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the within assignment, and acknowledged to me that he executed the same as one of the firm of Belt & Co., and as the free and voluntary act and deed of the firm of Belt & Co., therein mentioned, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal [L. s.] on the day and in the county aforesaid.

CHARLES HALSEY,
Notary Public, &c.

MERCEDES INDIAN RESERVATION,
Valley of San Joaquin, California.

Received of George G. Belt & Co. seven thousand five hundred and nine pounds of beef, at fourteen cents per pound, and sixteen hundred pounds of flour, at sixteen cents per pound; delivered to the Indians upon the Mercedes and Tuolumne reservations, as per contract, from January 1 to January 31, inclusive, in the year 1852.

The amount being thirteen hundred and seven dollars and twenty-six cents, which is to be paid out of the first appropriation made by the government of the United States for such purposes.

ADAM JOHNSTON,
United States Indian Agent, Valley of San Joaquin.

We, George G. Belt & Co., the firm named in the foregoing receipt and account, hereby assign and transfer the same to Charles V. Stuart, of the city of San Francisco, and authorize him to collect and receive the same to his own use and benefit. Witness our hands and seals this eighth day of January, A. D. 1855.

GEO. G. BELT & CO. [L. s.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this eighth day of January, A. D. 1855, before me, Charles Halsey, a notary public in and for said county, personally appeared William J. Howard, to me known to be the person who executed the within assignment, and acknowledged to me that he executed the same as one of the firm of Belt & Co., and as the free and voluntary act and deed of the firm of George G. Belt & Co., therein described, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal on [L. s.] the day and in the county aforesaid.

CHARLES HALSEY,
Notary Public, &c.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

Adam Johnston, of the said city, being duly sworn, deposes and says: That he was acting Indian agent for the United States in the valley of the San Joaquin, in said State, from the month of June, 1850, to the month of —, 1852, and that, according to his knowledge, information, and belief, the several articles charged and specified in the several accounts which are hereto annexed were actually furnished and delivered as specified therein, and at the prices therein set forth, and that there are due therefor the several sums mentioned in the receipts hereto annexed. Deponent further says that, as he is in-

formed and believes, the contract therefor by Messrs. Belt & Co. was fully and entirely fulfilled and performed by them.

ADAM JOHNSON.

Subscribed and sworn to this eighth day of January, A. D. 1855, before me.

[L. S.]

CHARLES HALSEY,
Notary Public, &c.

IN THE UNITED STATES COURT OF CLAIMS.

CHARLES V. STUART, complainant, *vs.* THE UNITED STATES.

I, the undersigned, William Hart, a commissioner duly appointed by the Court of Claims of the United States for the State of California, do hereby certify that, in pursuance of a stipulation, of which a copy is annexed to the deposition of P. T. Smith, in this case, I was duly attended, on the day mentioned in my certificate attached to this deposition, by J. D. Stevenson, esq., on the part of the claimant, and by J. B. Townsend, esq., on the part of the United States, and by Adam Johnston, the witness on the part of the claimant, who deposed as follows:

Question. State your name, age, occupation, and place of residence for the last year?

Answer. Adam Johnston; aged forty-six; lawyer; and place of residence San Francisco.

Question. State if you have any interest, direct or indirect, in the claim of Charles V. Stuart against the United States for supplies furnished to the Indian department in the State of California?

Answer. None whatever.

Question. State if you are in any degree related to said claimant?

Answer. None whatever.

Question. Did you, in the years 1851 and 1852, hold any appointment under the United States government; and if so, what was that appointment?

Answer. Yes; I was Indian sub-agent, first for the State of California, and subsequently for the valley of the San Joaquin.

Question. What were your duties under such appointment?

Answer. To ascertain the condition of the Indians in California; their number and condition generally.

Question. During the period above mentioned did you, as United States sub-Indian agent, make any contract with Belt & Co. for the supply of articles of food for the Indians in the valley of San Joaquin; and if so, did they supply such articles?

Answer. I did make a contract with Belt & Co. for a certain amount of beef monthly, which they furnished.

Question. Did you contract with them for the supply of any other article of food besides beef; if so, what?

Answer. Flour.

Question. State whether the papers now produced, and marked,

respectively, from 1 to 5, contain the account of the articles delivered by Belt & Co., by your orders, under the above contract?

Answer. They do.

Question. Are the receipts respectively attached to each account your receipts for the articles so furnished by Belt & Co.?

Answer. They are.

Question. State whether the prices charged by Belt & Co. in said accounts were the contract prices, and whether they were fair and reasonable at the time of the delivery thereof?

Answer. They were the contract prices, and I thought them at the time fair and reasonable.

Question. What was done with the articles so furnished by Belt & Co.

Answer. They were distributed among the Merced and Tuolumne river Indians.

Cross-examined by J. B. Townsend, esq., on the part of the United States.

Question. What amount of beef and flour did you contract with Belt & Co. to supply monthly?

Answer. No particular amount monthly; that would depend upon the number of Indians on the Merced and Tuolumne; at times there were a great many more than at others, and consequently had to supply more.

Question. Was your contract with Belt & Co. then to furnish the Indians of the Merced and Tuolumne rivers with beef and flour whenever they should ask for or demand it?

Answer. No, sir; it was regulated by my own idea of their necessities, and at the end of every month I gave receipts accordingly.

Question. Who made the manual delivery of beef and flour to the Indians?

Answer. Mr. Belt, generally; when he did not, some one of his partners, or some one in his employ.

Question. Were you present at the delivery of all or any of the articles charged in these accounts?

Answer. I was present when I could be; it sometimes happened that I was necessarily absent in other parts of the valley.

Question. Were you present when the articles charged in bill No. 1 were delivered to the Four Creek and Stanislaus Indians?

Answer. I was.

Question. Did you direct the quantity of articles charged in that bill to be delivered to them, respectively, or did you leave Messrs. Belt & Co. to deliver what quantity they saw fit, or the Indians might apply for?

Answer. We settled upon the amount between us, that is, Belt & Co. and myself, required for the number of Indians present on the occasion.

Question. Was this settlement before or after the articles were delivered, that is, settlement on the amount to be furnished?

Answer. I am under the impression it was before or during the time they were delivered, they were irregular in coming in.

Question. Were you personally present when the articles charged in bill No. 2 were delivered to the Merced and Tuolumne river Indians?

Answer. I was, but do not remember how long.

Question. Had Messrs. Belt and Co. authority from you to deliver to the Indians beef and flour when they should call for it in your absence?

Answer. No; not when the Indians should call for it. I was frequently obliged to confide in their delivering beef and flour to the Indians during my absence in the proper quantities.

Question. Who regulated the quantities?

Answer. I mostly regulated the quantities to be delivered.

Question. Who regulated the quantities when you did not?

Answer. Mr. Belt, if any change was made in the quantities in my absence.

Question. Did Mr. Belt regulate the quantities delivered in your absence.

Answer. I don't know of any change having been made in the quantities in my absence. If any quantities greater or smaller were delivered during my absence, it was on his judgment.

Question. Was the quantity delivered regulated by Mr. Belt's judgment in your absence.

Answer. It may have been; I suppose it was.

Question. What quantity per head did you deliver when present to each Indian?

Answer. I do not recollect how that was regulated.

Question. Was there any particular rule on the subject as to the quantity delivered to each?

Answer. I think not; sometimes it happened that they gathered grass seeds and such things as they subsist upon, and it was not necessary to give them as much at one time as another.

Question. Was the distribution made to all who might require provisions indiscriminately, or to any ones in particular?

Answer. At first provisions were delivered to the captains or chiefs of families. but I subsequently changed the mode of delivery so that all were supplied.

Question. Were all supplied who applied for provisions, and when they applied?

Answer. Not at all. There were certain days of delivery; occasionally Indians from the mountains, or wild Indians, would visit the Indian reservation, and on such occasions I generally furnished them with the requested food.

Question. Were there any fixed times of distribution, or days of distribution?

Answer. We had fixed days, and generally regulated from one delivery to another.

Question. What were those fixed days?

Answer. Sometimes one day of the week, and sometimes another.

Question. What governed the fixing of these days?

Answer. The necessities of the Indians, as I conceive.

Question. How often was this distribution made, per day, per week, or per month?

Answer. Sometimes two or three days would intervene between the deliveries, and sometimes more.

Question. Who regulated the days of delivery in your absence?

Answer. Mr. Belt, but I was generally there about the days of delivery.

Question. Was it the intention, in furnishing these provisions, to supply the Indians generally of the Merced and Tuolumne rivers with food to the extent that they needed it?

Answer. It was the intention to supply their deficiency of food.

Question. What number of Indians were there on the Merced and Tuolumne rivers and within your jurisdiction at that time?

Answer. On the Merced and Tuolumne rivers, I think, there were 950 permanent, and they were visited by strange Indians from the mountains to a considerable number, they were wild Indians and came down frequently; in my jurisdiction there was in the neighborhood of *five thousand*.

Question. Were the distributions confined to the Indians of the Merced and Tuolumne rivers, or made to any Indians requiring it within your jurisdiction?

Answer. The places of distribution were on the Merced and Tuolumne rivers, and distributed to other Indians who came there as well as those who resided there, and also distributed to the wild Indians who came from the mountains.

Question. Are the prices of provisions charged on these bills exhibited greater or less than those at which the same articles were furnished to white persons at that time?

Answer. I think the prices were about the same.

Question. Were the prices of the articles agreed upon previously to their being furnished or subsequently?

Answer. Previous to their being furnished.

Question. Were you present when the articles charged on bill No. 3 were furnished?

Answer. I presume I was present at the delivery of most of the articles. I am not positive of being present at the delivery of the whole.

Question. Are you positive of being personally present at the delivery of any of the articles charged on that bill?

Answer. I am not positive of any particular item.

Question. Are you positive of being personally present at the delivery of any of the articles charged on bill No. 4?

Answer. I am positive I was present at the delivery of a portion of the articles on this bill, but what items I cannot certify; the same remarks will apply to bill No. 5.

Question. Have you any means of knowing that the articles charged in these bills, Nos. 1, 2, 3, 4, and 5, as having been delivered, but which you say were not delivered in your presence, were, in fact, delivered, except the statements of Messrs. Belt & Co. to you, and their accounts made out for said articles?

Answer. I always heard of their being delivered, on my return, by others, who were in the employ of Belt or residing there.

Question. Have you any other means of such knowledge besides what you have now stated?

Answer. I believe not. I was always satisfied when signing the receipts, from some cause or other that such had been the case.

Question. What amount in all was furnished under contracts with you as Indian sub-agent, whilst you were such agent, with Belt & Co. and all others with whom you made such contracts?

Answer. I am unable to say from memory the amount?

Question. Was it as much as \$100,000?

Answer. I think not.

Question. Was it as much as \$50,000?

Answer. I am unable to say positively whether it was or not.

Question. To the best of your knowledge and belief was it as much as \$50,000?

Answer. About that, I should judge.

Re-examination.

Question. Do you know the signatures attached to each of the receipts on each of the bills produced?

Answer. I think I do. To bill No 1, the signature is in the handwriting of George G. Belt, of the firm of Belt & Co.; to bill No. 2, the same answer; to bill No. 3, the same answer; to bill No. 4, the same answer; the same to No. 5.

Question. Do you know the signature to the assignment on each bill; and if so, whose is it?

Answer. All of them are in the handwriting of William J. Howard, one of the firm of Belt & Co.

Question. Did Mr. George G. Belt hold any appointment under the government during the time the provisions were distributed as charged in the bills; and if so, what?

Answer. Early in 1851 I recommended him as a suitable person to trade with the Indians, and I was authorized by the department, on his executing the usual bonds, to appoint him, which I did.

Cross-examination resumed.

Question. Did you appoint Mr. Belt to trade with the Indians previous to any express authority from the department?

Answer. I don't think I appointed him. I could not without authority from the department.

Question. Had he given the bond as Indian trader, which you have spoken of, previous to the distribution of the goods charged in his bill?

Answer. I don't remember the date of the bond exactly, but I presume it was about the commencement of the delivery of those articles.

Question. Do you know of any other matter relative to the claim in question; if yea, please to state it?

Answer. Nothing.

ADAM JOHNSTON.

STATE OF CALIFORNIA, }
 County of San Francisco, } ss.

On this 29th day of May, A. D. 1856, personally came Adam Johnston, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Adam Johnston, taken at the request of the claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Charles V. Stuart.

The counsel of the United States was notified, did attend, did not object, and cross-examined the witness.

W. HART, *Commissioner*. [SEAL.]

DISTRICT OF COLUMBIA, }
 Washington County, } ss.

On this 26th day of June, A. D. 1856, personally came Oliver M. Wozencraft, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Oliver M. Wozencraft, taken at the request of Charles V. Stuart, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Charles V. Stuart *vs.* The United States:

General interrogatory by the commissioner. State your name, occupation, age, place of residence for the past year, whether you have any interest, direct or indirect, in the claim which is the subject of inquiry, and whether you are in any degree related to the claimant.

Answer. My name is Oliver M. Wozencraft; a physician; aged about forty-three years; and have resided in San Francisco, California, for the past year. I have no interest, direct or indirect, in the claim, and am not related to the claimant.

1st interrogatory. Were you in the employment of the government in California in the years 1851 and 1852? If yea, state the same, and also your instructions, if you had any.

Answer. I was in the employment of the government in California in 1851 and 1852, as a commissioner and Indian agent to make treaties with the Indians and to take charge of them. I had written instructions, which will be found in Senate Executive Document No. 4, March 17, 1853, special session.

2d interrogatory. Do you know one Adam Johnston? If yea, state what employment he was in, where, and under whose supervision.

Answer. I know Adam Johnston; he was in the employment of the government as a sub-Indian agent, acting in the San Joaquin valley, California.

3d interrogatory. Do you know anything of a contract made between the said Johnston and George G. Belt & Co., for the supply of beef and other provisions to the Indians of San Joaquin valley and Toulumne and Merced rivers? If yea, state the same, and say whether there was any exigency which made such contract necessary and proper.

Answer. I never saw the contract, but I know the fact that Belt & Co. were furnishing supplies to the Indians under Adam Johnston's supervision. There was a portion of the Indians with whom treaties were made, and who were moved into a reservation, and it was necessary to furnish them with supplies to prevent starvation.

4th interrogatory. If you know who compose the firm of George Belt & Co., state the same, and what was their employment in the Indian nation, and what was their character for honesty and probity?

Answer. I knew Mr. Belt intimately, and understood that William and George Howard were his partners at the time, but I do not know the fact. Belt was a trader, and always bore a good character for honesty.

5th interrogatory. If you know anything else to benefit the petitioner, state the same as though particularly interrogated.

Answer. I know nothing else.

O. M. WOZENCRAFT.

Cross-interrogatories on the part of the government.

1st cross-interrogatory. By what authority was the contract entered into?

Answer. I do not know.

2d cross-interrogatory. What other similar contracts were made by you and other commissioners? What amount is involved in those contracts?

Answer. I did not make the contract referred to, and therefore cannot further answer the question.

3d cross-interrogatory. Have not those contracts been uniformly rejected by the department, and did not the commissioners, in any case, deceive the contractors by leading them to suppose *that they have any such contracts?*

Answer. Contracts made by me, as commissioner for the supply of the Indians, have been rejected by the department. I am not aware that any deception was practiced on the contractors.

General interrogatory by the commissioner. Do you know of any other matter relative to the claim in question? If so, state it.

Answer. I do not.

O. M. WOZENCRAFT.

The adverse party did not attend.

A. AUSTIN SMITH,
Commissioner.

Commissioner's fees, \$6 30.

*Supplies to Indian agents.*CHARLES V. STUART *vs.* THE UNITED STATE.MARTIN B. LEWIS *vs.* THE UNITED STATES.

In these cases, in which testimony has been ordered, it is agreed that William Hart, esq., commissioner, should examine any witnesses that may be produced before him under the same conditions as are contained in the agreement to take testimony in the cases of Williams, Pacheco, Thompson, and Briones.

P. PHILLIPS,
Solicitor for Claimant.

M. BLAIR,
Solicitor for the United States.

WASHINGTON, *March* 18, 1856.

IN THE UNITED STATES COURT OF CLAIMS.

CHARLES V. STUART, complainant, *vs.* THE UNITED STATES.

I, the undersigned, William Hart, a commissioner duly appointed by the Court of Claims of the United States for the State of California, do hereby certify that, in pursuance of a stipulation, of which a copy is hereunto annexed, I was duly attended, on the day mentioned in my certificate attached to this deposition, by J. D. Stevenson, esq., on the part of the claimant, and by J. B. Townsend, esq., on the part of the United States, and by P. T. Smith, the witness on the part of the claimant, who deposed as follows:

Question. State your name, age, occupation, and place of residence for the last year.

Answer. P. T. Smith, aged 32 years, occupation, carpenter; residence for the last year, Mission Dolores, San Francisco.

Question. State if you have any interest, direct or indirect, in the claim of Charles V. Stuart against the United States for supplies furnished to the Indian department in the State of California?

Answer. None whatever.

Question. State if you are in any degree related to said claimant?

Answer. Not at all.

Question. In what employ were you in the years 1851 and 1852?

Answer. I was in the employ of George G. Belt & Co., on the Merced river, from June, 1851, to January, 1852.

Question. During that period do you know of any beef and flour being delivered to the Indians; if so, where and by whom?

Answer. Yes; beef and flour was delivered to the Indians on the Merced River Indian reservation. Beef was also sent over to the Tuolumne Indians.

Question. Who had charge of the Indians at that reservation?

Answer. Colonel Johnston, the sub-Indian agent.

Question. How often was beef and flour distributed to the Indians on the Merced and Tuolumne rivers, and in what quantities?

Answer. The beef was killed two or three times a week; there was killed sometimes one, sometimes three, but mostly three at each killing. I have seen bags of flour delivered to the Indians, but not much; I was not where I could see it. The beef was killed in a corral near where I was working, and I assisted frequently at the killing. I knew of a feast there was on the Merced of several bags of flour having been given to the Indians in sacks, I think, of 200 pounds each; this feast was, I think, in December, 1851.

Question. Did you see anything besides flour distributed to the Indians at that feast?

Answer. Yes, beef. During that large feast they must have killed four times that week, and must have killed that week about nine beasts, all of which was distributed except a quarter of one beef used in the house.

Question. What was the weight of the beasts, generally?

Answer. About four to five hundred, and might be, some of them, six hundred; the average was about five hundred; but I am not much of a judge of the weight of beef.

Question. Who was present at and delivered the beef to the Indians or superintended the delivery?

Answer. George G. Belt was the director, and colonel was around there at the delivery.

Cross-examined.

Question. Were you at Belt's store, on the Merced, during the whole of the time from June to January.

Answer. With the exception of a visit of a few days to Stockton on business, I was there all the time.

Question. Was the largest amount of beef distributed at the great feast which you have mentioned the largest quantity that you know to have been distributed while you were with Belt & Co?

Answer. It was the largest distribution in the same length of time.

Question. How long did that feast last?

Answer. About a week.

Question. Were there some weeks during the time that you were with Belt & Co. when there was no beef distributed to the Indians?

Answer. I think there was some little delivered every week; some weeks there was not much.

Question. Do you recollect any other great feast whilst you were there besides the one you have mentioned?

Answer. There was a big feast in June, soon after I went there; I think not so large as the others; there were one or two others, but not as large as those I have mentioned.

Question. Do you know of any other matter relative to the claim in question; if yea, state it?

Answer. I do not know of anything.

P. T. SMITH.

STATE OF CALIFORNIA, }
 County of San Francisco, } ss.

On this 13th day of June, A. D. 1856, personally came P. T. Smith, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of P. T. Smith, taken at the request of the claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Charles V. Stuart.

The counsel for the United States was notified, did attend, did not object, and cross-examined the witness.

WM. HART, [L. s.]
 Commissioner.

No. 3.

California was acquired by treaty on February 2, 1858, and admitted into the Union on September 9, 1850.

Gold had been discovered, and the rush of population to that region was such as the world had never seen before.

The government had thus assumed the protection of two races, the white man, citizens of the country, and the Indian tribes held in a state of pupilage.

On the 30th of September, 1850, they took the initiatory step of preserving peace, by appropriating \$25,000 "to enable the President to hold treaties with the Indian tribes in the State of California."

The \$25,000 was no limitation upon the power thus conferred; \$25,000 more for defraying expenses of holding treaties.

On the 30th of August, 1852, \$100,000 for the preservation of peace with the Indians who had been dispossessed of their lands, until permanent arrangement could be made for them.

On the 3d of March, 1855, \$125,000 for feeding and removing the Indians; \$25,000 for feeding those outside of the reservations; \$54,000 additional for physicians, &c.

INSTRUCTIONS.

Commissioner Indian Affairs to McK., B. & W., Commissioners, October 15, 1850, Doc. 4, p. 8.

"The object of the government is to make such treaties and compacts with them as may be just and proper." They were required to adopt such action "as would be most efficient in attaining the desired object, which is by all possible means to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties binding on them towards the government and towards each other."

Same to Same, April 12, 1851, Doc. 4. p. 14.

Informing them of the act, that all treaties were to be made by such agents as the President might designate, and designating them as agents to negotiate treaties "under the instructions heretofore given you as commissioner?"

Same to Same, May 9, 1851, D c. 4, p. 15.

"What particular negotiations may be required it is impossible for this office to foresee, nor can it give any specific directions on the subject. Much must be left to the discretion of those to whom the business is immediately intrusted."

On the 22d and 24th of May, 1851, Doc. 4, p. 15 and 16, the Commissioner acknowledges the receipt of several treaties. "The department fully appreciates the difficulties with which you had to contend in executing the important trust confided to you."

Commissioner of Indian Affairs to McKee, June 25, 1851, Doc. p. 4, 17.

"In the copies of treaties heretofore transmitted there are provisions for delivering to them sundry articles in 1851, which cannot be complied with, as Congress will not be in session in time to make the necessary appropriations. Should you conclude other treaties you will fix the time of payment under any stipulations at a period sufficiently in the future to allow of congressional action to meet the requisition."

On June 27, 1851, Same to Same, Doc. 4, pp. 17, 18.

"You will perceive that though \$75,000 was estimated and asked for the service in which you are engaged, Congress appropriated only \$25,000, the amount remitted on the 25th, which, with the \$25,000, heretofore placed in your hands, is all that is applicable to the negotiation of treaties in California, and when the funds referred to have been exhausted you will close negotiations, &c., as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriations made by Congress."

Thus a general authority was given without any special instructions, and the power conferred included all the proper means for executing the object.

The rule of law is thus stated: "When there is a special authority to do a particular act, or a general authority to do all acts in a particular business, each case includes the usual and appropriate means to accomplish the end."—(2 Kent's Com., 790.)

In the letter of appointment April 14, 1849, Doc. 4, p. 3, Johnston is directed:

"In making presents to Indians you will be as economical as possible, and confine yourself to such cases only as will effect some important object."

In the letter of appointment of the commissioners, October 15, 1850, they are informed that "Mr. Johnston will be directed to afford you all the aid in his power."

The 7th sec. act 30th June, 1834: "It shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law, and to carry into effect such regulations as may be prescribed by the President."

By the 17th section the President is to prescribe rules and regulations to effect the provisions of that or any other act relating to Indian affairs and for the settlement of the accounts of the Indian department. By the act 9th July, 1832, the President to appoint a commissioner, who shall, under the direction of the Secretary of War, and agreeably to such regulations as the President may from time to time prescribe, have the direction and management of all Indian affairs and of all matters arising out of Indian relations.

By the 5th rule, adopted June 1, 1837—General duties of agents and sub-agents:

5. To superintend and manage the intercourse of their respective tribes with other tribes and with citizens of the United States.

In the 5th of the Revised Regulations, November 11, 1836:

"All claims and accounts for expenditure will be rigidly examined; and when authorized by law or by the regulations and instructions, *or when in the exercise of a sound discretion* the Commissioner is of opinion the expenditure is *just and proper*, they will receive his sanction, and then be passed to the Second Auditor for settlement."

Adam Johnston to Commissioner of Indian Affairs, June 24, 1851, (Doc. 2, 511,) states his proceedings for the last three months:

"Should this or any other proceedings of mine not meet the approbation of the department, I hope to be informed immediately."

Commissioner to Johnston, August 12, 1851, (Doc. 4, 21,) approving the "additional subsistence" supplied, and stating that application would be made to Congress for appropriations to provide for them.

Johnston to Commissioner of Indian Affairs, October 8, 1851, (Doc 4, 195:)

"In all cases where my duties were not clear, I have always expressed in the document, 'the government concurring therein.'"—(Johnston to Commissioner, December 4, 1851, Doc. 4, 234.)

Commissioners McK., B. and W. to Commissioner of Indian Affairs, May 15, 1851, (Doc. No. 2, 486:)

"We have found by experience that the best way to keep the Indians quiet and peaceable is to give them plenty of food."

"For present pressing demands we have to do the best we can, fully satisfied that our policy is correct, and that it is in the end cheaper to feed the whole flock for a year than to fight them for a week."

Wozencraft to Commissioner of Indian Affairs, July 12, 1851, (Doc. No. 2, 488:)

"In order to effect this (treaty) I have sent men among them who speak their language and are influential, and placed beef cattle under the care of the traders, in order to supply their pressing necessities for food, in order to induce them to come down from out their mountain fastnesses."

Barbour to Commissioner of Indian Affairs, July 28, 1851, (Doc. No. 2, 496 :)

“The Indians in the San Joaquin and Tulare valleys, who a few months since were at open war with the whites, are now entirely peaceable and quiet,” &c.

McKee to Commissioner of Indian Affairs, October 4, 1851, (Doc. No. 4, 193 :)

“Since the receipt of your letter of May 22, expressing your approval of our general course in treating with the ‘*sui generis*’ tribes in California, I have felt relieved, and anxious to complete the work intrusted to me,” &c.

It is thus seen that the government was kept fully advised of the proceedings of the commissioners and agents. Their acts were never repudiated ; on the contrary, they were approbated. When payment was refused by the department, it was only on the ground of the want of means.

By means of the treaties thus entered into, the peace of the country was preserved. These treaties were all rejected by the Senate. The reason of this rejection has not yet transpired, but it is easy to form an opinion of the cause. The Indians had all been collected on their reservations ; the whites had surrounded them in such force that war was no longer to be apprehended, and peace was as well secured without as with the treaties. Congress therefore freed itself from the treaty responsibilities, but is bound by this very rejection by a stronger faith to pay for the means by which this was accomplished.

The power conferred on the President was to *hold* treaties. The character of the party was considered, and it was known that provisions had to be furnished to the tribes assembled for the purpose, and that present payments had to be made.

There are numerous precedents of Indian treaties wherein a part of the consideration inducing the treaty was actually paid and delivered at the time of signing the treaty, whilst other stipulations therein were postponed and suspended in force and effect until ratified by the President and Senate. Among such are :

The treaty with the Six Nations in 1794, preamble and article 6.—(Stat. at Large, Indian treaties, vol. 7, pp. 44, 46.)

Treaty in 1795 with the Wyandots, Delawares, and other tribes, preamble and article 4.—(Same vol., pp. 49, 51.)

Treaty with the Cherokees in 1798, preamble and article 6.—(Same vol., pp. 62, 63.)

Treaty with the Choctaws in 1801, preamble and article 5.—(Same vol., pp. 64, 67.)

Treaty with the Delaware tribe in 1804, preamble and article 2.—(Same vol., p. 81.)

Treaty with the Fox Indians in 1804, preamble and article 2.—(Same vol., pp. 84, 85.)

Treaty with the Cherokees in 1805, articles 3 and 5.—(Same vol., pp. 93, 94.)

Treaty with the Osages in 1808, article 5, par. 2, and article 13.—(Same vol., pp. 108, 110.)

Treaty with the Creeks in 1814, article 7.—(Same vol., pp. 120, 122.)

Treaty with the Ottoways, and others, in 1816, article 2.—(Same vol., p. 147.)

Treaty with Quapaws in 1818, articles 5 and 7.—(Same vol., pp. 177, 178.)

Treaty with Kickapoos in 1819, article 6.—(Same vol., p. 201.)

Treaty with the Sacs and Foxes in 1832, articles 10 and 12.—(Same vol., pp. 375, 376.)

Treaty with the Apalachicola band in 1832, article 2.—(Same vol., p. 377.)

Treaty with the Ki-o-wa, Ka-ta-ka and Ta-wa-ka-ro nations in 1837, articles 8 and 10.—(Same vol., p. 535.)

Such precedents, and the known habits and expectations of the savage tribes to have *something* paid them *immediately* at the making of a treaty, in provisions, merchandise, or money, and before the treaty could be submitted to the Senate, gave rise to the law of May 6, 1822, (3 Stat. at Large, p. 683, chap. 58, sec. 3,) which has been substituted by that of June 30, 1834, (vol. 4, p. 737, chap. 162, sec. 13.)

So the treaties were made by the commissioners lawfully appointed and authorized in that behalf.

CHARLES V. STUART, assignee of GEORGE G. BELT & Co.

The claim is by the assignee of Belt & Co., Charles V. Stuart, for supplies of food furnished to Indians on the order of the Indian sub-agent Johnston.

The first question as to right of assignee to bring the petition in his own name.

The act of February 26, 1853, was, as its caption shows, *to prevent frauds upon the treasury of the United States*, not to prevent the assignment of claims generally. There could exist no motive for this. The old doctrine against maintenance, which was the foundation of the rule against the assignment of choses in action, now has but a nominal existence, and influences the mere technical question as to the party on the record.

But the body of the act shows it has but a specific not a general application. It makes absolutely null and void all transfers and assignments of claims against the United States, unless made after "*the allowance of the claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.*"

This was evidently intended to protect the officers of government who had not the necessary means of investigating the due execution of the assignment; and would not apply to a case in court, where the allegation was to be proved according to the rules of law.

The act organizing the Court requires the claimant to set forth in his petition a statement of his claim, "who are the owners thereof,

or interested therein, and *when*, and upon what consideration such person became so interested." This refers to the very case of assignment, and the rules of the court enforce this provision.

By the act July 29, 1846, it was provided "that claims allowed shall not be paid to any one as attorney, unless the warrant of attorney should be executed *after the enactment of the act or resolution allowing the claim*," and a mode of executing and authenticating the warrant of attorney is provided.

The act of 1853 alters this by requiring the warrant to be not only after the enactment, but also after the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Now it is very evident that neither of these acts apply to cases before this Court, because the judgment of the Court will not only decide upon the amount due, but *as to the parties to whom* it is due, and the bill reported will ascertain those facts specifically; and no power of attorney will be necessary except a third person should be intervened after the passage of the bill.

The government has the entire control of the Indian tribes. They are subject races, recognized as having no sovereign right except the right to cede their lands to the United States.

They are treated as in a state of *pupilage* to the United States.—(Cherokee *vs.* State of Georgia, 5 Pet., 1.)

They are not permitted intercourse with the whites except by permission of the government.—(See intercourse act June 30, 1834, vol. 4, 732.)

The government is bound to see that they do not perish from starvation, and are bound for provisions supplied in the particular emergency of this case, upon the same principles as a father is bound for necessities furnished to a minor child.

So exclusive and full is this obligation that the government now holds itself responsible for depredations committed by the Indians.—(See 17 sec. act of 1834.)

The duties of Indian agents is prescribed in the 7th section of the act for the organization of the Indian department, vol 4, 736. To manage and superintend the intercourse with the Indians, &c. The words, manage and superintend, have an enlarged signification, and means the power to keep the peace in the relation of the whites to the Indians, and among the Indians themselves.

As these supplies were furnished with the approbation of the department, it is not necessary to confine ourselves to the precise limit of the authority of an Indian agent. The executive branch of the government through the appropriate department recognizes it.

The position is this: That the executive branch of the government was authorized to furnish these supplies, and that the ratification of the act is as good as an original authority to the agent to furnish them.

By the 13th section of the act for the organization of the department, it is provided "that all merchandise required by treaty, payable after the making of the treaty, shall be purchased under the direction of the Secretary of War, upon proposals to be received on notice previously given; and all merchandise required at the making of any treaty shall be purchased by commission; and all other purchases on

account of the Indian department shall be made by such persons as the President shall designate for that purpose.

This provision establishes these propositions: *First.* That it may be the duty of the government to furnish the Indians with provisions, though not required to do so by any treaty stipulations.

Second. When this extraordinary case arose, the President alone was fully authorized to fulfill this obligation through an agent to be designated by him.

Third. The amount of these provisions, and the necessity which justified his interposition, was left entirely to his discretion.

From this it follows that, as he had the right to furnish the provisions through his agent, he is fully authorized to recognize the act, though done without previous authority

If a man has authority through an agent to execute a deed, a deed made by his agent without authority, but subsequently approved, is good.

It has been frequently decided that the executive departments speak the voice of the executive himself.

For the evidence of this ratification see Senate document, special session, 1853, No. 4; letters of Johnston, Indian agent, pp. 104 105; letters of Interior Department, p. 21.

These letters show the history of the transaction.

For the views of Congress see report on Colonel Frémont's case.—(Rep. No. 289, 33d Congress, 1st session.)

Again, if these supplies were furnished to carry out an *obligation* of the government, though without previous authority, and the government recognizes the good faith in which the act was done, and the value of the thing supplied, then there is such an *obligation* on the part of the government as would raise an implied assumpsit, over which the Court will possess jurisdiction.

It will be remembered that the necessity of the act, and its bona fides were admitted by the solicitor in the argument.

P. PHILLIPS,
Solicitor for petitioner.

FEBRUARY 7, 1856.

IN THE COURT OF CLAIMS.—NO. 459.

CHARLES V. STUART *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

Besides the testimony taken in this case, and yet unprinted, the following public documents of Congress will be referred to, viz:

Document 1, Senate, second session thirty-first Congress, annual report of the Secretary of the Interior.

Document 61, Senate, first session thirty-second Congress, debts contracted by Indian agents, &c.

Document 4, Senate, special session, 1853, correspondence with Indian agents.

Which will be hereafter briefly designated as documents 1, 61, 4.

On or before the 14th of October, 1849, Adam Johnston was appointed sub-Indian agent on the Sacramento and San Joaquin rivers, in California, to include the Indians at or in the vicinity of those places, and any others to be subsequently designated by the Indian department.—(Com. Ind. Aff. to Johnston, Oct. 14, 1849, Doc. 4, p. 2.) This sub-agency was subsequently restricted to the Indians “in the valley of San Joaquin.”—(Com. Ind. Aff. to Johnston, Nov. 24, 1849, Doc. 4, p. 5 ; also pp. 4, 6.)

It seems this appointment was made under the 5th section of the act organizing the department of Indian Affairs, approved June 30, 1834.—(4 Stat., 735.)

By act of September 28, 1850, (9 Stat., 519,) the President was authorized to appoint three Indian agents for California, and by an act approved September 30, 1850, (9 Stat., 558,) an appropriation of \$25,000 was made, “to enable the President to hold treaties with the various Indian tribes in the State of California.”

George W. Barbour, Redick McKee, and O. M. Wozencraft, were appointed agents under the act of September 28, 1850, but it being soon discovered that no appropriation had been made for their salaries, their functions and salaries as Indian agents for California were suspended ; and they were appointed, under act of September 30, commissioners to treat with the Indians.—(Doc. 1, p. 29.) The instructions to them, dated October 15, 1850, as commissioners, are printed in Doc. 4, p. 8. The appropriation of \$25,000 was then remitted them.

By an act approved February 27, 1851, section 3, (9 Stat., 586,) it was enacted, that “hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose.” The provisions of this act were communicated to the commissioners by the Commissioner of Indian Affairs, in a letter dated April 12, 1851, (Doc. 4, p. 14,) whereby they were informed that their offices and functions as commissioners were abrogated and annulled ; they were, however, directed not to suspend negotiations, but to enter upon their appointments as agents, and were, *as such*, designated (under the act of 1851) to negotiate with the Indians of California, under the instructions already given.

This letter was received by the commissioners in San Francisco, early in June, 1851.—(Doc. 4, p. 130.)

By act of March 3, 1851, (9 Stat., 572,) a further appropriation of \$25,000 was made for expenses of treating with Indians in California, which was remitted to them by the Commissioner of Indian Affairs, June 25, 1851.—(Doc. 4, p. 17.)

On the 27th of June, 1851, (Doc. 4, p. 17,) the Commissioner of Indian Affairs wrote to the commissioners, that the two appropriations of \$25,000 each constituted all the money applicable to the negotiation of treaties in California ; and he said, “when the funds referred to have been exhausted, you will close negotiations and proceed with the discharge of your duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures

beyond the amount of the appropriation made by Congress." This letter reached McKee September 14, near Humboldt river, (p. 186,) Barbour at San Francisco, in September, (p. 260,) and Wozencraft on the Sacramento river, September 2.—(p. 180.)

The commissioners arrived at San Francisco between the 27th of December, 1850, and January 8, 1851, (Doc. 4, p. 53,) and soon after started southward up the valley of the San Joaquin, meeting and treating with the Indian tribes of the valley.—(Doc. 4, pp. 54 to 76.) Arrived near the head of the valley, at Camp Barbour, May 1, (Doc. 4, p. 76,) they concluded to separate and act individually in their several districts, which had been determined by lot. Barbour took the southern district, Wozencraft the middle district, and McKee the northern district.

This division was communicated to the Commissioner of Indian Affairs, by letters of May 1 and 13, 1851, (Doc. 4, p. 77,) and approved by him June 27, 1851.—(Doc. 4, p. 17.)

Charles V. Stuart claims, as assignee of George Belt & Co., for several bills of provisions (beef, flour, beans, &c.) furnished the Indians of the reservation on the Merced and Tuolumne rivers, for which he was trader, to the amount of \$7,826 06, by order of A. Johnston, from August 5, 1851, to January 31, 1852.

At this period Wozencraft was in charge of this agency; Johnston was only a sub-agent. The latter, indeed, appears to have considered himself as in charge of the reservations in the valley of the San Joaquin.—(See Doc. 4, p. 241.)

Johnson had received from the commissioners, August 28, 1851, (Doc. 4, p. 268,) 1,900 head of cattle for these and other Indians; this supply was deemed sufficient to last until May, 1852.—(See Doc. 4, p. 259.)

George Belt was an Indian trader, having the exclusive right to trade with the Indians on the reservation where he was settled.

The Indians on the reservation for which he was licensed were working and mining for him and other whites; and the traders paid large sums for licenses, and realized great profits from their trade with the Indians.—(Doc. 4, pp. 107, 207, 246.) It is contrary to public policy, if not in violation of statute, (act of June 30, 1834, sec. 14, 4 Stat., 738,) for any such trader to act as an agent of the United States, as Belt appears to have done.

The solicitor contends that the contract with Belt & Co. is void, being made contrary to the act of May 1, 1820, (sec. 6, 3 Stat., 568,) which prohibits any contracts, except such as are made under a law authorizing the same, or where there are appropriations adequate to their fulfillment.

And again: being made contrary to the provisions of the act of June 30, 1834, (sec. 13, 4 Stat., 757,) which prescribes the mode of purchasing goods for Indians.

And again: if these acts should not be held to apply, objection is further made for non-conformity to the act of March 3, 1809, (2 Stat., 536,) as construed by Attorney General Berrien, August 29, 1829.

It is claimed by the petitioners that the relation of the government to the Indians is similar to that of guardian to his ward; and it is,

therefore, bound for necessities furnished. If so, those who claim to have furnished necessities must prove the necessity, (Chitty Cont., 117, and cases there cited,) and that the government has funds of these wards in possession to pay the debt. But we deny the existence of that relation, and contend that the duty of the government to the Indians is one of imperfect obligation, and one which Congress only can acknowledge and discharge.

The solicitor denies that Johnston had authority to purchase the flour from Belt & Co.

He denies that the Indians for whom it was purchased needed it for their subsistence.

And he denies that any of it ever came into the possession of any officer or agent of the United States.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

C. V. STUART *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the Court.

The petitioner claims as the assignee of George W. Belt & Co., merchants and licensed traders to the Indians on the reservation between the Tuolumne and Mercedes rivers, and the claim is for supplies of food furnished to the Indians on that reservation, from August 5, 1851, to January 31, 1852, by Belt & Co., upon a contract made with them by Adam Johnston, sub-Indian agent for the San Joaquin valley, on the part of the United States.

The making of the contract is testified to by Mr. Johnston in his deposition, (answers to 6th and 7th direct interrogatories,) in which he says that he contracted with Belt & Co. for beef and flour, to be delivered in such quantities as in his judgment the necessities of the Indians at the reservation might require.

The delivery of the beef is testified to by Mr. Johnston and P. T. Smith. Mr. Johnston, in his deposition, (answers to 6th, 7th, 8th direct, 4th, 5th, 8th, 22d, 28th, 29th, 30th, 31st, and 32d cross-interrogatories,) states that the articles specified in exhibit No. 1 were delivered in his presence, and that he was present at the delivery of some portion of the articles specified in the other exhibits, Nos. 2, 3, 4, 5, respectively, but the particular items delivered in his presence he cannot specify; that at times deliveries of provisions were made in his necessary absence on the business of the reservations, and that in such cases he satisfied himself of the delivery from the persons employed to make it, and others present, before signing the receipts, which he verifies.

Mr. T. P. Smith, who was in the employ of Belt & Co., testifies (answer to 5th direct interrogatory) to the delivery of beef and flour to the Indians. Answer 7th, direct, he says: The beef was killed two or three times a week; there was sometimes one, sometimes three,

but mostly three at each killing. I have seen bags of flour delivered to the Indians, but not much ; I was not where I could see it.

It is observable that exhibit No. 1, (Johnston's deposition,) is altogether for supplies "furnished a party of Stanislaus Indians, and a party of Four Creeks Indians, while on a visit to this reservation," and the charge for these is \$462 81, and the exhibit specifies that they were delivered "as per verbal order." The supplies specified in the other exhibits are stated to have been delivered "to the Indians on the Mercedes and Tuolumne rivers" *as per contract*, and the amount of deliveries from December 1 to December 31, 1851, is nearly double the amount delivered in any other month, and Mr. Smith (answer 7th and 8th cross) says there was a feast in December which lasted a week, and in which they must have killed nine beasts, and he said "several bags of flour, weighing 200 pounds each, given to the Indians." Mr. Smith refers to two or three other feasts, but whether these were before or after August 5, 1851, does not appear.

Mr. Johnston, in his deposition, (24th cross,) states that there were on the Tuolumne and Mercedes rivers about 950 Indians, and that other Indians came there, as well as wild Indians from the mountains, and that distribution was made to all, according to their actual necessities.

Mr. Johnston testifies, (answer 26th cross,) sometimes two or three days would intervene between the deliveries, and sometimes more. Mr. Smith testifies that the beef was killed "two or three times a week." The exhibits (2, 3, 4,) represent the deliveries at regular intervals of a week. It appears from the evidence (Doc. 4, pp. 69 and 70) that the Indians were, under the first treaty made by the three commissioners, removed on to the reservation, March 20, 1851. In Doc. 4, p. 89, it is stated that Mr. Johnston left the commissioners to proceed to the Indian settlement between the Mercedes and Tuolumne rivers, to supply the Indians with such food as may be actually necessary. It is shown (Doc. 4, p. 95 ; Doc. 61, p. 11) that in April and May Mr. Johnston received from the commissioners forty head of cattle for these Indians, and the evidence does not show what supplies, or that any supplies, were thereafter furnished for them by the commissioners. (The 1,900 head of cattle delivered to Mr. Johnston by Commissioner Barbour, Doc. 61, p. 113, were for the Indians south of the Chouchilla river. Doc. 61, p. 11 ; Doc. 4, p. 259.)

And the evidence shows that the food for which this claim is made was contracted for by Mr. Johnston on his own authority merely, and that it was to supply the deficiencies in the amount furnished by the commissioners and stipulated in the treaties.

In his report of his transactions, made to the department, (Doc. 4, p. 104, June 24, 1851,) Mr. Johnston says, (pp. 105-'6,) speaking of the Indians: "They came from the mountains without food, depending upon the small amount allowed in their treaties, with the roots and seeds to be daily gathered by their females. These have been found wholly inadequate to their necessities. * * * *

"The consequences have been continual complaints for food, and I doubt not there has been some suffering among them.

"Under this state of things what was my duty? to say nothing of

humanity, under such circumstances, what was the best policy to be pursued by me for the interest of the government? *In the absence of authority*, and in view of the best interests of the government, I '*took the responsibility*' of furnishing *greater* supplies of beef to the Indians *than was stipulated in the treaties*, relying on the government for its payment in future."

In the same report, (Doc. 4, p. 106,) Mr. Johnston states: "Besides their original destitution on entering into the treaties, the Indians of the reservations are gradually swelling in numbers from the Monors or wild Indians from the adjacent mountains. Those are as destitute as their friends, and must be fed or they will return to their covert places in the mountains, and depend upon thieving and plunder for subsistence."

On August 12, 1851, the department acknowledges the receipt of Mr. Johnston's report, and in reply they instruct him, (Doc. 4, p. 21:) "The motives which prompted you to furnish *additional subsistence* to the Indians, and employ a physician to vaccinate them and prescribe for the diseased among them, are duly appreciated by this office, and as there are no appropriations now applicable to such expenditures, the department will recommend the subject to the favorable consideration of Congress, that such action may be had by that body as shall provide for them."

This case is the same in principle as the case of Samuel J. Hensley *vs.* The United States, heretofore decided by this Court, and for the reasons and considerations therein stated we are of opinion that the petitioner is not entitled to the relief he prays for.

MARTIN B. LEWIS.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MARTIN B. LEWIS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Depositions numbered 1, 2, 3, and 4, filed in the case and transmitted to the House of Representatives.
3. Solicitor's brief on the first and second argument.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. s.] seal of said Court, at Washington, this 3d day of February, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

To the Judges of the Court of Claims of the United States of America, established by act of Congress approved February 24, 1855:

The petition of Martin B. Lewis, a citizen of the United States, residing at the Fresno Indian reservation, Mariposa county, respectfully represents to this honorable Court, that he is the *bona fide* holder and owner for valuable consideration of a draft on the Commissioner of Indian Affairs for the sum of four thousand two hundred and seventy-eight dollars and fifty cents, a copy of which is as follows:

“SAN FRANCISCO, *March 29, 1852.*

“Upon the next appropriation by Congress for the Indian department, pay to the order of James D. Savage, for supplies furnished the Indians in fulfilment of treaty stipulations, four thousand two hundred and seventy-eight dollars and fifty cents, (\$4,278 50.)

“O. M. WOZENCRAFT,
“*United States Indian Agent.*

“Hon. LUKE LEA,
“*Commissioner of Indian Affairs.*”

Endorsed: “JAMES D. SAVAGE.”

Your petitioner further represents, that the draft, of which the foregoing is a copy, was given by O. M. Wozencraft, the then United States Indian agent, at the time it bears date, and was for supplies furnished the United States by said James D. Savage, (the party to whom the said draft was made payable,) at the instance and by the order of O. M. Wozencraft, the Indian agent, the full particulars of which is set forth in exhibit marked A. Your petitioner states that the prices charged in said account were the lowest market prices for such merchandise at that time and place. Your petitioner further states that he is the sole owner of said claim, and became so by a transfer of the same to him for its face by the public administrator of Mariposa county, and surviving partner of Savage, for a debt of equal amount justly due to your petitioner by said Savage, and allowed in the settlement of Savage's estate. The draft was duly sent forward and presented for payment, and payment refused.

Your petitioner, therefore, prays that the Solicitor of the United States, appointed to represent the government before this honorable Court, may be required to answer this petition, and that such proceedings may be had thereon as justice and equity require; and that on the final hearing that this Court will grant to your petitioner such relief as his case merits.

JONATHAN D. STEVENSON,
Attorney for said Petitioner.

City and County of San Francisco.

This day, before me, William Hart, a notary public in and for the county of San Francisco, and duly authorized to administer oaths therein, appeared Lewis Leach, and made oath that the statements relative to the matters of fact in the foregoing petition of Martin B. Lewis are true, the affiant living in California, and having personal knowledge thereof.

LEWIS LEACH.

Subscribed and sworn to before me, this 25th day of January, 1856.
W. HART, *Notary Public.*

Exhibit A, being a copy of an original in the charge of O. M. Wozencraft.

THE UNITED STATES INDIAN DEPARTMENT,

To MAJOR JAMES D. SAVAGE & Co., Dr.

To furnishing the Indians on the San Joaquin reservation the following articles, viz :

1851.

December	1.	To...500 lbs. of flour, at 37½ per lb.....	\$187 50
	5.	To...600.....do.....do.....	225 00
	10.	To...600.....do.....do.....	225 00
	10.	To...100.....do.....do.....	37 50
	15.	To...600.....do.....do.....	225 00
	20.	To... 600.....do.....do.....	225 00
	26.	To...800.....do.....do.....	300 00

1852.

January	1.	To...700.....do.....do.....	262 50
	10.	To...600.....do.....do.....	225 00
	25.	To...800.....do.....do.....	300 00
	25.	To...300.....do.....do.....	112 00
February	1.	To...400.....do.....do.....	230 00
	5.	To...100.....do.....do.....	37 50
	6.	To...100.....do.....do.....	37 50
	10.	To...600.....do.....do.....	225 00
	15.	To...300.....do.....do.....	112 00
	27.	To 1,500.....do.....do.....	562 00
March	3.	To 1,000.....do.....do.....	375 00
	9.	To 1,000.....do.....do.....	375 00

4,278 50

UNITED STATES OF AMERICA, }
State of California, City and County of San Francisco, } ss.

James D. Savage, within named, being duly sworn, doth depose and say, that he is one of the firm of Savage & Co., within named, and that the said firm of Savage & Co. furnished and provided to and for the Indians in the San Joaquin reservation all and singular the goods and supplies within mentioned, and that the within account is a just and true account of the goods and supplies so as aforesaid furnished the said Indians, and that the same is justly due to this deponent's said firm, and that no part thereof has been paid to said firm, or to any other person by their order, or for their use, and that the amount justly and truly due deponent's said firm amounts to \$4,278 50.

JAMES D. SAVAGE.

Subscribed and sworn to before me, this 27th day of March, A. D. 1855, as witness my hand and official seal.

MATHEW F. FURMAN,
Notary Public in and for said County.

I certify, on honor, that the above account is true and just, and that the supplies were for the benefit of the United States.

O. M. WOZENCRAFT,
U. S. Indian agent, Middle District, California.

No. 1.

Exhibit A, being a copy of an original in the charge of O. M. Wozencraft.

M. B. LEWIS, }
vs. } W. HART, Commissioner.
THE UNITED STATES. }

The United States Indian department to Maj. Jas. D. Savage & Co., Dr.

To furnishing the Indians on the San Joaquin reservation the following articles, viz:

1851.

December 1, to 500 pounds of flour, at $37\frac{1}{2}$	\$187 50
December 5, to 600 pounds of flour, at $37\frac{1}{2}$	225 00
December 10, to 600 pounds of flour, at $37\frac{1}{2}$	225 00
December 10, to 100 pounds of flour, at $37\frac{1}{2}$	37 50
December 15, to 600 pounds of flour, at $37\frac{1}{2}$	225 00
December 20, to 600 pounds of flour, at $37\frac{1}{2}$	225 00
December 26, to 800 pounds of flour, at $37\frac{1}{2}$	300 00

1852.

January 1, to 700 pounds of flour, at $37\frac{1}{2}$	262 50
January 10, to 600 pounds of flour, at $37\frac{1}{2}$	225 00
January 25, to 800 pounds of flour, at $37\frac{1}{2}$	300 00
January 25, to 300 pounds of flour, at $37\frac{1}{2}$	112 00
February 1, to 400 pounds of flour, at $37\frac{1}{2}$	230 00
February 5, to 100 pounds of flour, at $37\frac{1}{2}$	37 50
February 6, to 100 pounds of flour, at $37\frac{1}{2}$	37 50
February 10, to 600 pounds of flour, at $37\frac{1}{2}$	225 00
February 15, to 300 pounds of flour, at $37\frac{1}{2}$	112 00
February 27, to 1,500 pounds of flour, at $37\frac{1}{2}$	562 00
March 3, to 1,000 pounds of flour, at $37\frac{1}{2}$	375 00
March 9, to 1,000 pounds of flour, at $37\frac{1}{2}$	375 00

4,278 50

UNITED STATES OF AMERICA, }
State of California, City and County of San Francisco, } ss.

James D. Savage, within named, being duly sworn, doth depose and say, that he is one of the firm of Savage & Co., within named, and that the said firm of James D. Savage & Co. furnished and provided to and for the Indians in the San Joaquin reservation all and singular the goods and supplies within mentioned, and that the within

account is a just and true account of the goods and supplies so as aforesaid furnished the said Indians, and that the same is justly due to this deponent's said firm, and that no part thereof has been paid to said firm, or to any other person by their order, or for their use, and that the amount justly and truly due deponent's said firm amounts to four thousand two hundred and seventy-eight dollars and fifty cents.

JAMES D. SAVAGE.

Subscribed and sworn to before me, this twenty-seventh day of March, A. D. eighteen hundred and fifty-two, as witness my hand and official seal.

MATHEW F. FURMAN,
Notary Public in and for said County.

I certify, on honor, that the above account is true and just, and that the supplies were for the benefit of the United States.

O. M. WOZENCRAFT,
United States Indian Agent, Middle District, California.

Exhibit B.

M. B. LEWIS,
vs.
THE UNITED STATES. } WM. HART, *Commissioner.*

SAN FRANCISCO, *March 29, 1852.*

Upon the next appropriation by Congress for the Indian department, pay to the order of James D. Savage, for supplies furnished the Indians in fulfilment of treaty stipulations, four thousand two hundred and seventy-eight dollars and fifty cents, (\$4,278 50.)

O. M. WOZENCRAFT,
United States Indian Agent.

HON. LUKE LEA,
Commissioner of Indian Affairs.

Endorsed: "James D. Savage."

IN THE UNITED STATES COURT OF CLAIMS.

MARTIN B. LEWIS vs. THE UNITED STATES.

I, the undersigned, William Hart, a commissioner duly appointed by the Court of Claims of the United States for the State of California, do hereby certify that, in pursuance of the stipulation, a copy of which is hereunto annexed, I was duly attended on the day mentioned in my certificate attached to this deposition by J. D. Stevenson, esq., on the part of the claimant, and by J. B. Townsend, esq., on the part of the United States, and by Lewis Leach, the witness on the part of the claimant, and who deposed as follows:

Question. State your name, age, occupation, and place of residence for the last year.

Answer. Lewis Leach; aged thirty-four; practicing medicine; on the Fresno I have resided for the last year.

Question. State if you have any interest, direct or indirect, in the claim of Martin B. Lewis against the United States, for the sum of four thousand two hundred and seventy-eight dollars and fifty cents, on a draft for that amount drawn by O. M. Wozencraft, United States Indian agent, on the Hon. Luke Lea, Commissioner of Indian Affairs?

Answer. I have none.

Question. State if you are in any degree related to the claimant.

Answer. None whatever.

Question. State where you resided from December, 1851, to April, 1852, and what your occupation was?

Answer. I resided on the Fresno river, and was acting as book-keeper for James D. Savage & Co.

Question. Do you know of any supplies and provisions having been furnished by Savage & Co.; if so, when and where and to whom?

Answer. In the winter of 1851 and 1852; on the Fresno river; to the Indians.

Question. By whose orders were those provisions furnished?

Answer. By the order of O. M. Wozencraft.

Answer. Look at that bill and say what you know about it. (Exhibit A.)

Answer. This bill is a duplicate or copy of one furnished to O. M. Wozencraft by Major James D. Savage, for which the draft was drawn for \$4,278 50.

Question. (Draft shown witness, marked exhibit B;) say whether that draft is the one you allude to?

Answer. It is.

Question. Do you know of the delivery of the articles or provisions mentioned in exhibit A?

Answer. I do. A portion of the articles were delivered by me and the balance by Major Savage, in my presence. I cannot say that every sack was delivered in my presence, but most of it was; but I know the flour was delivered.

Question. Was the price charged in exhibit A for the flour fair and reasonable at that time?

Answer. It was. The freight alone was fifteen cents a pound, and a year after that flour was sold there for 75 cents per pound.

Cross-examination.

Question. Are you the same Lewis Leach whose affidavit is to the petition in this case?

Answer. I am.

Question. How did it happen that you verified the complaint or petition?

Answer. I was here in San Francisco at the time, and knew more of the circumstances than any other person.

Question. Did you bring the accounts and draft exhibits A and B to this city, and place them in the hands of petitioner's attorney?

Answer. I did.

Question. Have you acted as the agent of the petitioner in reference to this claim?

Answer. I have not.

Question. Were you in the employ of the petitioner at the time you brought exhibits A and B to this city?

Answer. I was not.

Question. Have you any compensation for your services with reference to this claim dependent on its result?

Answer. None whatever.

Question. How do you know that exhibit A is a duplicate or true copy of one furnished O. M. Wozencraft by J. D. Savage?

Answer. I have seen the original, which I copied from the books of J. D. Savage & Co., and the copy produced and marked exhibit A I examined with the one in Wozencraft's possession.

Question. Did you personally compare exhibit A with the original which you say you copied from the books of Savage & Co.?

Answer. I did not compare it item by item with the original, but compared it sufficiently to ascertain that the footing was the same, that the general appearance was the same, and that it corresponded in amount with the draft.

Question. Did you make the entries in the books of Savage & Co. of the items charged in exhibit A, at the several dates when charged?

Answer. I did.

Question. Is this the whole amount of provisions furnished by Savage & Co., by the direction of Wozencraft, for the Indians?

Answer. No, sir; only a small portion.

Question. Do you know what amount was so furnished by Savage & Co. for the Indians?

Answer. I could not state the exact amount, but probably, in his own name, about \$25,000, and in the names of a good many parties with whom he was interested, probably to the amount of \$30,000 to \$35,000; the balance of the \$25,000, less this draft, stands on the books of Savage & Co. as an open account.

Question. Were you present at the store of Savage & Co. during all the time from December 1, 1851, to March 9, 1852?

Answer. I was.

Question. What proportion of the articles charged did you deliver?

Answer. It is impossible for me to say; but to the best of my recollection I delivered about three-fourths of it.

Question. Were there other persons who dealt in flour in the vicinity of Savage & Co. besides them?

Answer. None nearer than twelve miles.

Question. Was not flour sold by Savage & Co., or others in that vicinity, between the 1st of December, 1851, and the 9th March, 1852, for less than 37½ cents per pound?

Answer. No, sir; most of it was sold at 50 cents; none sold less than 37½ cents, and most at 50 cents a pound.

Question. Do you know of any other matter or thing relative to the claim in question? If yea, state it.

Answer. No.

LEWIS LEACH.

STATE OF CALIFORNIA, }
 County of San Francisco, } ss.

On this 28th day of June, 1856, personally came Lewis Leach, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Lewis Leach, taken at the request of the claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of M. B. Lewis.

The counsel for the United States was notified, and did attend; did not object, and cross-examined the witness.

WM. HART, [SEAL.]
 Commissioner.

No. 2.

IN THE UNITED STATES COURT OF CLAIMS, WASHINGTON.

MARTIN B. LEWIS *vs.* THE UNITED STATES.

Lewis Leach, a witness already examined in this case, being desirous of adding to his testimony some further explanation, appeared before the commissioner on the day mentioned in the certificate hereunto attached, and in the presence of J. B. Townsend, esq., solicitor for the United States, answered the following questions:

Question. State what further explanations (if any) you are desirous of making to your former testimony given in this case.

Answer. I would state that, in reading the petition again, in this case, I find in it the following statement: That he (the petitioner) is the "sole owner of said claim, and became so by a transfer of the same to him for its face by the public administrator of Mariposa county;" the statement in said petition should have been that the said draft was transferred to me by the public administrator of Mariposa county for a debt of that amount due by the estate of J. D. Savage, and which was transferred by me to the complainant Lewis for a valuable consideration. I would further add, that I was the clerk of Savage at the time the supplies mentioned in the petition were made on the order of Wozencraft by Savage, and that the entry or entries of the same in Savage's books were made by me, and the copy thereof attached to my former testimony was taken and copied by me from such entries in said book; the account delivered Wozencraft of the supplies for which said draft was given was also copied from said entries in said book.

Cross-examined.

Question. When was the copy from the books of Savage, which you say was annexed to your former testimony, made by you?

Answer. I think in 1854; the latter part, or the early part of 1855. I cannot say positively, but think about that time.

Question. In whose possession were the books of Savage at that time?

Answer. They were in my possession; I believe they might have been in the possession of the probate court.

Question. Do you know where they are now?

Answer. I may have the book in which the said entries were made, if they are in existence; when I removed my store I was sick; since then I have had no occasion to look for them.

Question. Who was the administrator that transferred the account and draft mentioned in the petition to you?

Answer. B. B. Harris, of Mariposa; he was the public administrator at that time.

Question. What authority, if any, had he for making the transfer?

Answer. Made by order of the judge of the probate court.

LEWIS LEACH.

STATE OF CALIFORNIA, }
County of San Francisco, } ss.

On this ninth day of September, 1856, personally came Lewis Leach, the witness within named, and after having been first sworn to "tell the truth, the whole truth, and nothing but the truth," the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of the witness, Lewis Leach, taken at the request of the claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Martin B. Lewis. The counsel for the United States, J. B. Townsend, esquire, attended said examination, and did not object thereto.

W. HART, [L. s.]
Commissioner.

No. 3.

DISTRICT OF COLUMBIA, }
Washington County, } to wit.

On this twenty-fifth day of June, A. D. 1856, personally came Oliver M. Wozencraft, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but

the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Oliver M. Wozencraft, taken at the request of Martin B. Lewis, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Martin B. Lewis vs. The United States.

General interrogatory by the commissioner. State your name, occupation, age, place of residence for the past year, and whether you have any interest, direct or indirect, in the claim which is the subject of inquiry, and whether you are in any degree related to the claimant.

Answer. My name is Oliver M. Wozencraft; a physician; aged about forty-three years, and have resided in San Francisco, California, for the past year. I have no interest, direct or indirect, in the claim, and am not related to the claimant.

1st interrogatory. Were you in the employment of the government of the United States in California in the year 1852? If yea, state the character of your employment; and if you acted under written instructions, attach a copy of those instructions to your deposition.

Answer. I was appointed by the President of the United States a commissioner and an Indian agent to make treaties with the Indians in California, and to take charge of them. I acted in this capacity in 1852. My instructions were in writing, and will be found in a copy hereto appended, marked exhibit A.

2d interrogatory. Did you draw a draft on the 29th of March, 1852, on the Commissioner of Indian Affairs, in favor of James Savage, for \$4,278 50, expressed on its face to be in fulfilment of treaty stipulations, and is the same treaty set forth in the said petitioner's claim filed in court? State for what purpose the said draft was given, and what exigency required you to enter into said contract.

Answer. I drew a draft on or about that time for that amount in fulfilment of treaty stipulations, being for supplies furnished the Indians in favor of James D. Savage; this was expressed on the face of the draft. I do not know that the treaty is set forth in the petitioner's claim in court; but the treaty to which I refer is one negotiated by Reddick McKee and George Barbour and myself, and forwarded on to the Indian bureau some time in the month of May, 1851. The draft was for flour for the Indians who had been moved into a reservation set apart for them, and who had no means of subsistence, and the exigency was to keep them from dying from starvation.

3d interrogatory. Do you know the petitioner? If yea, state whether he was not the co-partner of said Savage at the time of said contract, and whether said Savage is not now dead.

Answer. I know the petitioner, but cannot say whether he was or was not the partner of Savage; they were a great deal together, and

interested in various business transactions. I do know that Savage is dead.

4th interrogatory. Do you know anything else in reference to said claim? If yea, state the same fully.

Answer. I know nothing else further than what is shown by vouchers on file in the Indian bureau.

O. M. WOZENCRAFT.

Cross-interrogatories by the Solicitor of the United States:

1st cross-interrogatory. Was not the draft given in payment of supplies bought for the Indians, which you obtained from Savage under a contract entered into without authority?

Answer. It was not. On the contrary, I had authority, as will appear by my commission and instructions.

2d cross-interrogatory. What amount of similar contracts were entered into by you and other commissioners?

Answer. I made similar contracts, to the amount of several hundred thousand dollars; as to the amount of the contracts of the other commissioners I cannot state.

3d cross-interrogatory. Have not all such been rejected?

Answer. I believe that they have by the Indian bureau.

4th cross-interrogatory. Did you, or any other commissioner, mislead Savage or Lewis, or any other contractor, by inducing him or them to believe you were authorized to make these and other similar drafts?

Answer. I never misled or attempted to mislead any contractor as to the character of my authority. I can't speak for the acts of the other commissioners.

O. M. WOZENCRAFT.

The opposite party did not attend.

A. AUSTIN SMITH,
Commissioner.

Commissioner's fees, \$8 50.

Exhibit A.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, October 15, 1850.

GENTLEMEN: I have the honor to enclose herewith a copy of a letter from the Secretary of the Interior, by which you will find that your functions and salaries as Indian agents are suspended, and that you are appointed, with the sanction of the President, commissioners "to hold treaties with various Indian tribes in the State of California," as provided in the act of Congress approved September 30, 1850. Your commissions are also enclosed.

Your compensation, as provided by law, will be eight dollars per day for every day you are actually employed, and ten cents per mile for your travel by the usually travelled route to your place of destina-

tion. After your arrival in the country in which your duties lie, you will be allowed your actual travelling expenses from place to place where duty may call you.

You will be allowed a secretary, to be appointed by you after your arrival in California, whose compensation must not exceed \$5 per day for his services; and his actual travelling expenses will be allowed. It is not probable that his services will be required for the whole time continuously, and you will therefore employ him only for such time as may be actually necessary.

The services of interpreters will be indispensable in your negotiations. You are therefore authorized to employ such number and for such periods as you may find requisite, confining yourselves to the smallest number, for the shortest periods, and for the lowest compensation that competent persons can be obtained for. These precautions of economy are made solely with reference to the small amount of the appropriation when compared with the great object to be attained.

The first named gentleman of your board, being present, has been entrusted with the duties of disbursing agent of the commission, and the sum of \$25,000, the whole amount of the appropriation, has been placed in his hands for disbursement; the other two commissioners, together with all other expenses of the commission, will be paid by him.

You will find, on your arrival in California, Adam Johnston, esq., sub-agent at San Joachim, from whom you will doubtless receive much valuable information, as his residence in the country for considerably more than a year has enabled him to collect a great deal relating to the Indian tribes, their location, their manners, habits, customs, disposition towards the whites and each other, and the extent of civilization to which they have arrived.

Mr. Johnston will be directed to afford you all the aid in his power, and give you all the information in his possession that may be of use to you in the discharge of your duties.

The department is in possession of little or no information respecting the Indians of California, except what is contained in the enclosed* copies of papers, a list of which is appended to these instructions; but whether even these contain sufficient data to entitle them to full confidence will be for you to judge, and they are given to you merely as points of reference.

As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and contracts with them as may seem just and proper. On the arrival of Mr. McKee and Mr. Barbour in California, they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission; the board will convene, and, after obtaining whatever light may be within its reach, will determine on some rule of action which will be most efficient in attaining the desired object, which is, by all possible means to con-

* Placed in the hands of Mr. McKee.

ciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties binding on them towards the government and each other. You will be able to judge whether it will be best for you to act in a body or separately in different parts of the Indian country.

It is expected that you will keep a journal of your daily proceedings, and report fully to this office everything that occurs in your operations. Copies of these reports you will forward from time to time, the whole to be reserved by you for a general report, accompanied by such treaties as you may make, when your mission shall have been brought to a close.

Another commission has been authorized, consisting of Messrs. C. S. Todd, Robert B. Campbell, and Oliver P. Temple, to procure information and make treaties with the Indians on the borders of Mexico. Should you meet at any time, (which is scarcely to be expected,) you will co-operate and act in concert, so far as may be agreed on between you; and it is requested that, whenever this may be the case, there will be no misunderstanding as to your relative powers, or collision in your understanding of your relative duties, it being regarded that each board is independent of the other, and it is expected that all intercourse between them will be harmonious.

Very respectfully, your obedient servant,

AS. LOUGHERY,
Acting Commissioner.

Messrs. REDICK McKEE, GEORGE W. BARBOUR, and O. M. WOZENCRAFT, *Commissioners.*

P. S. Since writing the above, a telegraphic communication has been received from Mr. Wozencraft at New Orleans, and he has been notified through the same channel that his commission and a triplicate of these instructions will be sent to him at that place.

AS. L.

The foregoing five papers are a true copy from the original furnished by the witness (O. M. Wozencraft) and referred to in the deposition as exhibit A.

Test:

A. AUSTIN SMITH,
Commissioner.

No. 4.

THE STATE OF CALIFORNIA, }
County of Mariposa. }

Be it known, that on the 19th of September, 1855, I delivered to Lewis Leach one draft for four thousand two hundred and seventy-eight dollars and fifty cents, (\$4,278 50) drawn by O. M. Wozencraft, United States Indian agent, on the Hon. Luke Lea, Commissioner of Indian Affairs, and payable to the order of James D. Savage out of the

then next appropriation by Congress for the Indian department, for supplies furnished the Indians in fulfilment of treaty stipulations; endorsed James D. Savage, and dated March 29, 1852. The said draft was delivered by me to said Leach, and I hold his receipt therefor.

Dated this November 29, 1856. [For the Indian department interlined before signing.]

B. B. HARRIS,
Administrator of James D. Savage, deceased.

THE STATE OF CALIFORNIA, }
County of Mariposa. }

I, James M. Bondurant, county and probate judge in and for the aforesaid State and county, do hereby certify that the estate of the above named James D. Savage, deceased, is in course of administration in the probate court of the said county of Mariposa; that the above signed B. B. Harris is the administrator thereof, and that the delivery of the said described draft was made with my approval.

Witness my hand and the seal of said county at Mariposa, this the [L s.] 24th day of December, A. D. 1856.

J. M. BONDURANT,
County Judge, ex-officio Probate Judge.

IN THE COURT OF CLAIMS.—No. 506.

MARTIN B. LEWIS *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

Besides the testimony taken in this case, and yet unprinted, the following public documents of Congress will be referred to, viz:

Doc. 1, Senate, 2d session 31st Congress—Annual Rep. Sec. Int.;

Doc. 61, Senate, 1st session 32d Congress—Debts contracted by Indian agents, &c.;

Doc. 4, Senate, special session, 1853—Correspondence with Indian agents;

which will be hereafter briefly designated as documents 1, 61, 4.

On or before the 14th of October, 1849, Adam Johnston was appointed sub-Indian agent on the Sacramento and San Joaquin rivers, in California, to include the Indians at or in the vicinity of those places, and any others to be subsequently designated by the Indian Department.—(Com. Ind. Aff. to Johnston, Oct. 14, 1849, Doc. 4, p. 2.) This sub-agency was subsequently restricted to the Indians “in the valley of San Joaquin.”—(Com. Ind. Aff. to Johnston, Nov. 24, 1849, Doc. 4, p. 5; also pp. 4, 6.)

It seems this appointment was made under the 5th section of the act organizing the Department of Indian Affairs, approved June 30, 1834.—(4 Stat. 735.)

By the act of September 28, 1850 (9 Stat., 519,) the President was authorized to appoint three Indian agents for California; and by an act approved September 30, 1850, (9 Stat., 558,) an appropriation of \$25,000 was made "to enable the President to hold treaties with the various Indian tribes in the State of California."

George W. Barbour, Redick McKee, and O. M. Wozencraft were appointed agents under the act of September 28, 1850, but it being soon discovered that no appropriation had been made for their salaries, their functions and salaries as Indian agents for California were suspended, and they were appointed, under act of September 30, commissioners to treat with the Indians.—(Doc. 1, p. 29.) The instructions to them, dated October 15, 1850, as commissioners, are printed in Doc. 4, p. 8. The appropriation of \$25,000 was then remitted them.

By an act approved February 27, 1851, sec. 3, (9 Stat., 586,) it was enacted that "hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose." The provisions of this act were communicated to the commissioners by the Commissioner of Indian Affairs, in a letter dated April 12, 1851, (Doc. 4, p. 14,) whereby they were informed that their offices and functions as commissioners were abrogated and annulled; they were, however, directed not to suspend negotiations, but to enter upon their appointments as agents, and were, *as such*, designated [under the act of 1851] to negotiate with the Indians of California, under the instructions already given.

This letter was received by the commissioners in San Francisco early in June, 1851.—(Doc. 4, p. 130.)

By act of March 3, 1851, (9 Stat., 572,) a further appropriation of \$25,000 was made for expenses of treating with Indians in California, which was remitted to them by the Commissioner of Indian Affairs, June 25, 1851.—(Doc. 4, p. 17.)

On the 27th of June, 1851, (Doc. 4, p. 17,) the Commissioner of Indian Affairs wrote to the commissioners that the two appropriations of \$25,000 each constituted all the money applicable to the negotiation of treaties in California; and, he said, "when the funds referred to have been exhausted you will close negotiations and proceed with the discharge of your duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress." This letter reached McKee September 14, near Humboldt river, (p. 186,) Barbour at San Francisco, in September, (p. 260,) and Wozencraft on the Sacramento river, September 2.—(p. 180.)

The commissioners arrived at San Francisco between the 27th of December, 1850, and January 8, 1851, (Doc. 4, p. 53,) and soon after started southward up the valley of the San Joaquin, meeting and treating with the Indian tribes of the valley.—(Doc. 4, pp. 54 to 76.) Arrived near the head of the valley, at camp Barbour, May 1, (Doc.

4, p. 76,) they concluded to separate and act individually in their several districts, which had been determined by lot. Barbour took the southern district, Wozencraft the middle district, and McKee the northern district.

This division was communicated to the Commissioner of Indian Affairs by letters of May 1 and 13, 1851, (Doc. 4, p. 77,) and approved by him June 27, 1851.—(Doc. 4, p. 17.)

From Camp Barbour Wozencraft returned to San Francisco May 13, and on the 24th left again to visit and treat with the Indians in the northern part of his district. From this he returned to San Francisco on or before the 30th of September, (Doc. 4, p. 187.) Besides what cash he had expended he had incurred debts for provisions furnished to Indians up to September 16 to the amount of \$60,060, (Doc. 4, p. 189.)

This sum alone exceeded the whole appropriation, and he had previously, as above shown, received the letter of the Commissioner of Indian Affairs of June 27, 1851, directing him in that event to cease negotiation. From this date forward, therefore, September 16, 1851, he had no authority except as "agent simply."

The claim of Lewis arose long after this date.

The claim is for flour furnished the Indians by James D. Savage & Co., from December 1, 1851, to March 9, 1852, to the amount of \$4,278 50, by order of Wozencraft. For this amount Wozencraft drew upon the Indian department a draft dated San Francisco, March 29, 1852. This draft was endorsed in full by J. D. Savage to Wells, Fargo & Co., and by them to Riggs & Co. It was not accepted by the drawee, and indeed does not appear ever to have been presented for payment. It came into the hands of Savage's administrator, and was by him passed to Lewis. All endorsements subsequent to that of J. D. Savage are stricken out; and the body of his endorsement is also stricken out, leaving his name alone. This is not an endorsement in blank, which will enable the holder to maintain an action on the draft; nor can there be any privity of contract between the United States and the holder, since the draft has not been accepted. The testimony shows that this claim is a portion of a claim of more than \$25,000, all constituting the same cause of action; and it is not competent for Savage or his representatives to parcel out this claim and subject the United States to several suits. The whole should be presented and investigated together.

Savage was a trader, licensed to trade with the Indians south of the San Joaquin. The Indians on the reservation for which he was licensed were working and mining for him and other whites, (Doc. 4, p. 128;) and the traders paid large sums for licenses, and realized great profits from their trade with the Indians, (Doc. 4, pp. 107, 128.) It is contrary to public policy, if not in violation of statute, (act of June 30, 1834, sec. 14, 4 Stat., 738,) for any such trader to act as an agent of the United States, in exercising a discretionary authority to distribute provisions among the Indians, as Savage appears to have done.

It is not proven that the Indians were entitled to receive this supply of beef, under any agreement made with them by the commissioners,

or either of them ; but even if they were, it is contended that no authority was given to the commissioners to do more than was necessary to conclude treaties ; that this authority did not extend beyond the conclusion of the treaties—*i. e.*, the commissioners could not, under the authority to conclude the treaties, agree with the Indians, as an inducement to accept terms, that the treaties themselves should be fulfilled before being ratified by the Senate, or even being forwarded to the President. See letters of Commissioner of Indian Affairs to them, June 25, 1851, and July 16, 1851, (Doc. 4, pp. 17, 18.) The act of June 30, 1834, sec. 13, (4 Stat., 737,) designates the officer under whose direction all goods required to fulfil treaties with Indians shall be purchased.

The solicitor maintains that the commissioners had no authority to make contracts beyond what was expressly or impliedly given in their written instructions :

That, if they had any such authority as commissioners, it was taken away by the act of February 27, 1851 ;

Or, if not by that act, then by the instructions of April 12, 1851, even if given under an erroneous construction of the act, (*U. S. vs. Eliason*, 16 Pet., 291 :)

And that all authority, except as agents simply, ceased under instructions of June 27, 1851, on or before the 30th of September, 1851.

It is further contended, that the contract with Savage is void, being made contrary to the act of May 1, 1820, (sec. 6, 3 Stat., 568,) which prohibits any contracts, except such as are made under a law authorizing the same, or where there are appropriations adequate to their fulfilment ;

And again, being made contrary to the provisions of the act of June 30, 1834, (sec. 13, 4 Stat., 757,) which prescribes the mode of purchasing goods for Indians ;

And again, if these acts should not be held to apply, objection is further made for non-conformity to the act of March 3, 1809, (2 Stat., 536,) as construed by Attorney General Berrien, August 29, 1829.

It is claimed by the petitioners, that the relation of the government to the Indians is similar to that of guardian to his ward ; and it is, therefore, bound for necessities furnished. If so, those who claim to have furnished necessities must prove the necessity, (*Chitty on Cont.* 117, and cases there cited,) and that the government has funds of these wards in possession to pay the debt. But we deny the existence of that relation, and contend that the duty of the government to the Indians is one of imperfect obligation, and one which Congress only can acknowledge and discharge.

The solicitor denies that Wozencraft had authority to purchase the flour from Savage.

He denies that the Indians for whom it was purchased needed it for their subsistence.

And he denies that any of it ever came into the possession of any officer or agent of the United States.

JOHN D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

MARTIN B. LEWIS *vs.* THE UNITED STATES.*Brief on reargument.*

Claim for the amount of a draft made on the 29th of March, 1852, by O. M. Wozencraft, a United States Indian agent for California, upon the Commissioner of Indian Affairs, for the sum of \$4,278 50.

The claimant insists that this draft was for supplies furnished by James D. Savage, at the instance of said Wozencraft, for the Indians on San Joaquin reservation between the 1st of December, 1851, and the 9th of March, 1852,

FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. That the said Wozencraft had no power or authority from the government to contract the debt in question.

1. The statute does not confer the power upon agents or commissioners to contract debts.

The 7th section of the act for organizing the Department of Indian Affairs (4 U. S. L. 736) specifies the duties of Indian agents in these words :

“It shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies *agreeably to law*; to obey all *legal* instructions given to him by the Secretary of War, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs, and to carry into effect such regulations as may be prescribed by the President.”

There is no regulation made by the President authorizing the contracting of a debt by an agent.

2. The instructions to Wozencraft neither authorized or contemplated that he should contract a debt.

The instructions to him and his colleagues are dated October 15, 1850, (Senate Doc. 4, p. 8,) and contain the following :

“You are appointed, with the sanction of the President, commissioners ‘to hold treaties with various Indian tribes in the State of California,’ as provided in the act of Congress approved September 30, 1850.” This was the act appropriating the \$25,000.

The instructions further provide :

“As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and compacts with them as may seem just and proper. On the arrival of Mr. McKee and Mr. Barbour in California, they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission. The board will convene, and, after obtaining whatever light may be within its reach, will determine upon some rule of action which will be most efficient in attaining the desired object, which is, by all possible means, to con-

ciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties, binding on them towards the government and each other. You will be able to judge whether it will be best for you to act in a body, or separately, in different parts of the Indian country."

There is nothing in the instructions at all intimating that the commissioners might contract debts.

3. On the 9th of May, 1851, the functions of the commissioners were terminated, and they were directed to enter upon their duties as agents

No new functions were specified in the letter of the Commissioner.

In reply to a letter of Curtiss & Peabody, Governor Marcy, as Secretary of War, wrote, December 7, 1848, in relation to the Frémont claim, as follows: (Ex. Doc. 109, p. 67.)

"As no officer of this department is authorized to borrow money on the faith of the United States, the department cannot recognise any such contract."

The Indian Office, in a letter to the Interior Department, dated April 13, 1852, (Doc. 61, p. 2,) states:

"The whole amount of appropriations for Indian purposes in California was placed in the hands of the agents, and they had no authority whatever for exceeding that amount in their negotiations."

"The question of the liability of the government to pay these debts must necessarily be decided by Congress."

Second. The commissioners, and Wozencraft in particular, and those with whom they dealt, including Savage, knew and perfectly understood that they had no power to contract debts.

This fact is fully established by the terms of the draft itself.

In the letter of Wozencraft, of May 29, 1852, to the Indian Office, (Doc. 4, p. 332-'3,) speaking of Hensley's drafts, he says:

"I deem it due to myself to inform you of the foregoing facts, and to assure you that I am aware that I have no authority to draw on the department other than *presumptive* drafts on the current action of Congress!"

Barbour (Doc. 61, p. 3) says:

"After separating with my colleagues, many proposals were made by different persons to supply the amount of beef, &c., necessary to carry out the treaties that had been or might be made. I invariably answered such propositions by an assurance that I had no direct authority to make such contracts."

Wozencraft, (Doc. 4, p. 121,) in a letter dated July 18, 1851, says: "In the subsequent contracts, the parties agree to furnish the beef at the current cash price for net beef at the place of delivery, delivering them on foot, and wait for the money until an appropriation is made."

Third. Wozencraft and the other agents were forbidden by the Indian Office to contract debts, and long prior to the contracting this particular debt.

On the 16th of July, 1851, the acting commissioner, Mix, wrote to Barbour as follows:

"SIR: Your letter of May 14, 1851, transmitting copy of a treaty

concluded by you at Camp Belt with several tribes of Indians in California, has been received.

“Your attention is directed to the following extract of a letter to Agent McKee, June 25, 1851, to which you will conform your action in future negotiations of treaties: ‘In the copies of the treaties made with several Indian tribes heretofore transmitted to this office, there are provisions for delivering to them sundry articles in 1851, which cannot be complied with, as Congress will not be in session in time to make the necessary appropriations. Should you conclude other treaties, you will fix the time and payment, under any stipulation, at a period sufficiently in the future to allow of congressional action to meet the requisition.’ ”—(Doc. 4, p. 18.)

On the 27th of June, 1851, Mr. Mix wrote to McKee as follows:

“You will have perceived that though \$75,000 were estimated and asked for the service in which you are engaged, Congress appropriated only \$25,000, the amount remitted you on the 25th instant, which, with the \$25,000 heretofore placed in your hands, is all that is applicable to the negotiation of treaties in California; and when the funds referred to have been exhausted, you will close negotiations and proceed with the discharge of your duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress.”—(Doc. 4, p. 17.)

This letter was received by McKee the 14th September, (Doc. 4, p. 186,) and Barbour in September, (p. 260,) and Wozencraft on the 2d of September, 1850, (p. 180.)

Mr. Mix, on the 9th of July, 1851, wrote Wozencraft, (Doc. 4, p. 21,) as follows:

“You will forward to this office diagrams of the country ceded by the Indians to the United States, and of the lands reserved for them, in all treaties you have concluded or may hereafter negotiate with them; and also transmit in every case the estimates of the money that will be required to fulfil the stipulations that may have been agreed upon.”

Barbour, (Doc. 61, p. 4,) in writing the Indian Office, says: “Your department had instructed the commissioners to make no further stipulations for feeding Indians during 1851, in any treaties we might make after the receipt of that letter.”

Fourth. The Indian Office did not approve, but disapproved of the contracting debts by these agents.

On the 17th of May, 1852, Mr. Lea wrote McKee and Wozencraft as follows, (Doc. 4, p. 26:)

“GENTLEMEN: It is feared a considerable length of time may yet elapse before the necessary appropriations are made to enable the superintendent of Indian affairs for California to repair thither and enter upon the duties of his office; I have, therefore, to request that at the earliest practicable period you make a full and detailed report directly to this office of all contracts, debts, and liabilities made and incurred by the agents of the department in California. These are matters that have given rise to much discussion here as well as in California, and the agents owe it to themselves and to the government

to place the department in possession of all facts and circumstances tending to elucidate transactions of so much importance, and yet of such a character that they cannot be approved."

Fifth It is not shown that the supplies charged for in this case were furnished under any treaty, ratified or unratified.

The abstract made by Wozencraft, found at page 398 of document 4, states that Savage's claim was for flour furnished in San Joaquin valley. I have found no evidence showing that there was a treaty containing provisions requiring the payment by the government to these Indians of any amount in money or provisions, nor any showing that the flour was delivered in pursuance of such provisions. It may have been so, but, if it was, it has not been proved.

Sixth. The only proved pretext for contracting these debts consisted in fears occasioned by the illegal and unauthorized acts of these agents themselves.

1. Wozencraft, Barbour, and McKee were authorized to make treaties, and to expend, in so doing, the two appropriations of \$25,000 each.

They could incur all the usual and necessary expenses in holding councils, (such as feeding the Indians and making presents,) at that or at a future time, out of the money thus appropriated.

2. They were authorized to insert such provisions in the treaties as they might deem expedient; but these could not become operative until ratified by the Senate, nor could payments be made under them until Congress should make the necessary appropriations.

3. They had no authority to contract, in the treaties to pay money or furnish supplies, until the treaties became a law by ratification. They were restricted in their powers to make expenditures to the appropriations furnished to them. They could not by treaty make a contract for supplies, or anything else, that would be binding or operative upon either party until approved by the President and Senate. This they and all dealing with them were bound to know, and did actually know, as is shown by the letters of the agents.

4. It is conceded in the letters of the agents, and nowhere denied, that the Indians, if they had been permitted to remain where the agents found them, would have been able to subsist as they formerly had done.

In a letter of the 15th of October, 1851, (Doc. 4, pp. 204, 206,) Wozencraft thus describes their original condition:

"In the valleys we find a mild, equal, and temperate climate throughout the country; the indigenous products, suitable for food, not so abundant, however, as in the tropical latitudes, constantly requiring of the natives, in order to supply their wants, a great portion of their time in procuring their food. There is an abundance of game in these locations, such as the elk and antelope, both of which are with difficulty captured, being found on the open plains. The rivers abound in fish, obtained at certain seasons. In procuring their food, a degree of industry is requisite; and thus we have a full type, in the higher organization of the climate, of the animal and vegetable products of the country. These Indians, like the climate, are mild, pas-

sive, and tranquil, industrious through necessity, and only so far as necessity requires in providing for their daily wants.

"The large game above referred to being so difficult to procure, they content themselves with the vegetable products and the lesser animals more easily obtained, from the *hare* down to *small vermin*; thus procuring their food through patient perseverance, and showing the valley Indians to be mild, patient, submissive, and tractable.

"The mountain Indians differ from those in the valleys as materially as do the climate and its products. There they have a cold bracing atmosphere, abounding in game, with but a sparse vegetable product. The climate requiring a full animal diet, compels them to pursue the chase and encounter its perils. The deer abound in the mountains, and it becomes necessary for the Indians to toil in their pursuit if they expect to procure their meat for food; in doing which they undergo great physical exertion, which the climate and its products are well calculated to sustain. And thus we have a race of beings immediately adjacent to the former, yet differing widely from them in every respect. Here are athletic, wild, brave, independent, and measurably intractable beings; their physical and mental organization far superior to those in the valleys. And there is a third and intermediate race, whose abodes are between the plains, and immediately within the foot-hills; thus forming three separate and distinct races, all within a few degrees of longitude of each other. These tribes possess intermediate characteristics of the other two, showing as perfect gradation in their leading traits as there is in the climate and products of the country in which they live.

"Those tribes living high up in the mountains are generally larger and finer looking, with fairer skins and higher cast of features, and, as previously stated, more independent. The country affords them a great variety of products, from which they collect their food. The acorn being their great staple of consumption, one of the first causes of their complaints is, that the white man is destroying their oaks. The mansanette, a small apple, is also an article of food with them. Indeed, there is a great variety of seeds, berries, and vegetable products that have hitherto supplied their wants. But their broad fields are fast disappearing, and will continue to do so, as the white population increases, until their resources and bounteous nature are gone from them. In the mean while we would wish to teach them husbandry, that they may learn to produce from small fields a sufficiency to supply their wants.

"The salmon abound in these streams. The Indians construct dams entirely across the river, driving down poles in a peculiar manner, holding the maul or driver up in the air, while they repeat an invocation. They then fill it up by wicker-work of the willows. In adopting which method for trapping the fish, they cut off, in a measure, the supplies of those living above on the same streams. At all events they are there abundantly supplied, and this may be the favoring cause of their superior development."

At page 44, Johnson says :

"They all subsist on roots and grass-seeds from the earth, acorns and pine-seeds from the trees, and fish from the streams. Acorns,

nuts, and small fish, are gathered in great quantities and stored in magazines, prepared for the purpose. They universally lay up enough of these things for two years' subsistence, and thereby guard against a failure in the future crop of the coming season.

"The acorns and nuts are ground into a kind of flour, which is done by means of mortars or deep basins drilled into rocks. Into these the acorns and nuts are placed and pounded as fine as flour. Before baking, the Indians not unfrequently mix with the flour berries of various kinds. All this is the work of the squaws, or, as they call them, '*mohales*.' Indeed, the same characteristics mark the whole of the tribes in the great valley of the Sacramento and its adjacent territory. They have an indefinite idea of their right to the soil, and they complain that the *pale-faces* are overrunning their country and destroying their means of subsistence. The emigration are trampling down and feeding their grass, and the miners are destroying their fish dams. For this they claim some remuneration, not in money—for they know nothing of its value—but in the shape of clothing and food."

At page 105, he says:

"I would call your attention first to the situation of the Indians of this region before and at the time the respective treaties were entered into by them. They are an ignorant, indolent, and rather migratory people, who heretofore lived upon roots, grass-seeds, acorns, pine nuts and fish. Their main subsistence, however, was acorns, which they usually gathered in large quantities and stored away in magazines. On the breaking out of the war in December last, the Indians returned to the mountains, leaving behind them their principal stores of subsistence, intending to return for them as necessity required. The whites, in pursuing them, burnt and destroyed all that fell in their way; consequently, at the time the different treaties were entered into, the Indians of this region were destitute of anything to subsist upon, even if left to range at liberty over their native hills. Under each treaty they were required to come from the mountains to their reservations on the plains at the base of the foot-hills "

5 The Indians were taken to new homes without authority, and these homes were known to be poor.

There is no pretence that the agents had authority to take from the Indians their old homes, and remove them to others, to which they had acquired no special right or title.

They had not, in fact, sold their old homes, nor had they obtained new ones by a binding contract, and it is a matter of history that the government has repudiated those which the agents entered into.

The agents knew that they were acting without lawful authority.

They, in fact, were wronging the Indians, in order to give the whites the lands they wanted, by reserving to the Indians poor lands which were useless to them, and would always be comparatively so.

Wozencraft (Doc. 4, p. 133) says: "The land given them is measurably unoccupied; it is very poor, with the exception of two or three small valleys."

At page 206, of Doc. 4, Wozencraft says: "It is to be regretted that most of the reservations given to them (the Indians) there is but little good tillable soil."

Again, he says, at page 83: "The country set apart for them so far is very poor soil; only a small portion is adapted to agricultural purposes."

These extracts show that, by unauthorized acts of these agents, the Indians were deprived of those possessions which were most valuable to them, and attempted to be hemmed in upon small tracts of poor territory. They also prove that to these acts, and those of violence on the part of the whites, are attributable all the difficulties and dangers, if any existed. The pretence that the Indians were starving, and that therefore there was a necessity for furnishing provisions, is all an idle pretence, and got up, mainly, to secure a sanction of illegal acts which had no good foundation to rest upon.

The real cause of all these transactions will be shown under another head.

Seventh. It is not shown that the supplies charged for in this case were furnished to prevent the Indians from starving.

The evidence shows that other causes than the fear that the Indians would starve were at the bottom of the arrangements in contracting debts. Wozencraft does not put his justification upon that ground, nor does Barbour.

The real reason for furnishing provision to the Indian is to be found in—

1. The anxiety of the whites to possess the Indian homes and hunting grounds, and the gratification of the gold diggers.

2. To pacify the Indians, and to prevent their resenting the wrongs inflicted upon them by the whites.

It is also probable that the anxiety of persons to supply provisions at the prices charged had some influence in making the contracts for their delivery.

It is clear that the anxiety of the whites to oust the Indians and to possess their country was a leading motive for making the arrangement which produced the alleged necessity for supplying the Indians with provisions.

This motive, so far from being concealed, is avowed.

But the evidence on this point is so interwoven and connected with that of pacifying the Indians and whites that I shall give both together.

Barbour says, (Doc. 61, pp. 23-'4:) "We found the Indians at open war with the whites in many parts of the State, and with but few exceptions, I believe, in the southern portion of the State, (that portion subsequently assigned to me;) they were hostile, and the war between them and the whites characterized by those acts of rapine and murder usual in Indian warfare. The country called for some relief from such a state of affairs; the miners had been driven from the gold mines, and every day almost, some outrage or injury was done to the persons or property of the citizens, and in return many of the Indians were killed, and their stores and provisions destroyed."

Wozencraft (in Doc. 4, p. 337,) says: "The Indians were then in open hostility. The citizens were clamorous for protection, and were unsparing in abusing the administration for seeming neglect. The soldiers were in the field at a heavy expense, without commensurate

success. Under the foregoing existing state of affairs I pushed forward, exerting every means within my power."

He also writes, (Doc. 4, p. 211:) "It will be indispensably necessary that the Indians should be protected from those claiming to be civilized beings."

At page 207 he says: "Indeed, the Indians complained very much, and only consented to go that they might have a home in which they would be protected from the white man."

"The Indians would not consent to move further from their mountain homes than the foot-hills"

Johnston (at p. 200) says: "I am convinced that a bad feeling exists among the Indians, generally, in consequence of the whites remaining in the territory."

At page 196 he says: "The greatest trouble I have had was with miners and persons who were located on the reservations for the purpose of trading with the Indians, and smuggling intoxicating drinks to them"

Wozencraft (at p. 133) says: "It is the opinion of all persons living in this section of the country that pacific measures cannot be effected with those Indians until they are chastised and subdued; they are and always have been very inveterate in their hatred towards the whites, and very formidable from the time of the first aggression of the whites."

At page 112 he says: "I have been informed that on former occasions those Indians who have been at peace with the whites have been cruelly persecuted by those who either killed or abused their men without assigning a cause therefor; all of which has been very unfortunate, making it difficult for me to have an interview with or conciliate them."

3. The remedy proposed and urged to avoid the consequences of these various illegal acts of the agents and the whites was to feed the Indians at the expense of the government so that they should not feel and appreciate their wrongs.

It is easy to understand that while the immediate wants of an Indian are supplied he will be comparatively quiet and will not feel any loss he may have sustained. Even his resentments will be hushed, and those who have wronged him will be safe from his retaliation.

The whites understood this remedy and the agents practiced and applied it at the expense of the government without the shadow of authority.

In Document 61, pp. 3, 4, Barbour says: "Under such circumstances the commissioners undertook to effect a reconciliation and to carry out the plan agreed upon for treating with the Indians. * * A very important feature in those treaties (and one, too, without which no treaty could have been made with those Indians) was the supply of an agreed amount of beef and flour to aid in the subsistence of the Indians treated with. Without some such provision, the commissioners, as well as every intelligent man in California, knows that no treaty made with those Indians would be observed by them."

"By feeding the Indians with beef, as stipulated in the treaties,

I was satisfied, as was every man in California who knew anything of the character of the Indians in that country, that it was the best possible means of conciliating the good feelings of the Indians, and thus carry out the spirit, if not the letter, of our instructions."

Eighth. That the whites had nothing to fear from the Indians, except the consequences of their own wrongful acts

Wozencraft, Barbour, and McKee wrote the Indian Office on the 17th of February, 1851, as follows:

"We learned, among other things, that hostilities of a deadly character existed between the Indians and whites in different portions of the State, threatening, indeed, a general border war.

"Rumors are reaching us every day of fresh outbreaks and new outrages, some of them of the most cruel and revolting character. In many instances the whites have by their own bad conduct superinduced the difficulties."

On the 1st of May, 1851, the three agents wrote the Indian Office. They say, (Doc. 4, p. 76:)

"If the secret history of the late disturbances is ever written, but nineteen out of every twenty will be found to have had their origin in direct aggression on the part of unprincipled white men, or the failure on their part to supply the Indians with beef and flour as the promised reward of their labor."

On the 14th of May, 1851, Wozencraft wrote the Indian Office (Doc. 4, p. 82) as follows:

"The common and favorite place of abode of the Indians in this country was in the valleys and within the range of mountains; the greater portion were located, and had resided as long as their recollections and tradition went, on the grounds *now being turned up for gold*, and now occupied by the gold hunters, by whom they have been displaced and driven higher up in the range of mountains, leaving their fisheries and acorn grounds behind."

Wozencraft issued a proclamation, without date, to the people living among the Indians, (Doc. 4, p. 165,) in which he says:

"It would appear that most of the difficulties that unfortunately have occurred between the whites and red men have been owing to an improper and short-sighted policy, or rather a want of true policy, with these children of the forest. Since the discovery of gold in this region, the section of country that was and is peculiarly the home of the Indians has been found rich in the precious metal, and consequently filled with a population *foreign* to them; and this has been done in most instances without attempting to conciliate or appease them in their *grief* and *anger* at the loss of their homes. I am sorry to say, that in many instances they have been treated in a manner that, were it recorded, would blot the darkest page of history that has yet been penned. Had they even been *foreign* convicts, possessing, as they do, a full knowledge of the evils of crime and the penalties therefor, and received the punishment that has been dealt to these poor ignorant creatures, this enlightened community would have raised a remonstrative voice that would have rebuked the aggressor, and caused him to go beyond the pale of civilized man.

"Indians have been shot down without evidence of their having

committed an offence, and without even any explanation to them of the nature of our laws; they have been killed for practicing that which they, like the Spartans, deemed a virtue; they have been rudely driven from their homes, and expatriated from their *sacred grounds*, the grounds where the ashes of their parents, ancestors, and beloved chiefs repose. The reverential and superstitious feeling of the Indians for the dead, and for the ground where they were deposited, is more powerful than that of any other people.

“This is not only inhuman and unlawful, but it is bad policy. The Indians of the Pacific are not unlike this great ocean in that respect; they are pacific, and very *tractable*.”

On the 7th of August, 1851, Wozencraft wrote the Indian Office, (Doc. 4, p. 133:)

“Ten of said tribes are valley Indians, and are very friendly disposed towards the whites, but have much just cause of complaint, as the whites have taken possession of their homes, and they, through necessity, are reduced to servitude. Their labor is required only in the harvesting season, and the balance of the year they may shift for themselves the best way they can.”

On the 14th of October, 1851, Wozencraft wrote the Indian Office, (Doc. 4, pp. 205–210:)

“The valley Indians are mild and tractable, making good and faithful laborers, submitting to correction; and if in fault, to correction without a murmur.”

“I am sorry to say they (the Indians) have but little confidence in the white man. Their intercourse has been well calculated to make them skeptical as to his goodness and fidelity.”

At page 120, he says:

“In fact, the whites have enclosed all the favorite grounds of the Indians, leaving them no alternative but to go higher up in the mountains, or starve, in most instances denying them the privilege of working in the placers.”

Barbour, in a letter dated January 5, 1852, to the Indian Office, (Doc. 61, p. 2,) says:

“Necessity as well as inclination would compel them (the Indians) to steal from the whites animals on which to subsist, as in a large majority of cases the stores of acorns, &c., laid up by them had been destroyed by the whites.”

Ninth. The present claimant is not the lawful owner of the account which Savage had against the United States.

There is no assignment of the account which formed the consideration of the draft.

The testimony of Leach, as well as the certificate of B. B. Harris, administrator, shows that nothing but the draft was attempted to be transferred by the administrator on Savage's estate or the probate court. If the draft is not valid, or has not become the property of Lewis, then he cannot fall back upon the account and recover for that. Leach swears that the draft was assigned to him by the administrator, and by him transferred to the claimant. There can be no ground for saying that the account was thus assigned from one to another.

There is nothing in the evidence proving that any of the numerous parties to this draft ever became the owner of any portion of Savage's account against the government. There is nothing to show that payment of it to Lewis would be a bar to a claim by the legal representative of Savage. Lewis must recover on the draft, or wholly fail in his attempt to establish a claim.

Tenth. The present claimant shows no title to the draft in question.

The draft itself shows that it was payable to the order of James D. Savage, and specially endorsed by him and made payable to the order of Wells, Fargo & Co., and by the latter specially endorsed to the order of Riggs & Co., and by them in blank.

If these names subsequent to Savage had not been stricken out, on proving them, the claimant would have shown title. But by striking them out he defeats his own evidence of title. He was not authorized to strike out the special endorsement over Savage's name, in order to make title. That, with Savage's name, showed title out of him. Lewis has not shown the title out of Savage's endorsee. There is an entire omission of all evidence to show that the endorsements to Wells, Fargo & Co., and by them to Riggs & Co., was for the mere purpose of collection, and that the real title remained in Savage, and that the draft was returned to him by those employed to collect it.

It is not shown that Savage had any title to it when he died. This not being shown, the evidence fails to show title in his administrator which he could convey to Leach. This being so, Leach acquired none to convey to Lewis.

The draft may, perhaps, belong to Lewis, but he has not shown it.

It may be claimed and shown to belong to another, and, if valid, might be awarded, hereafter, to such other person, because, if Lewis has no title, the true owner may hereafter successfully assert his claim, notwithstanding a payment to Lewis.

It is the fault of the plaintiff if he has failed to make the proof necessary to establish his title to the draft in question.

Eleventh. The claimant has not shown, as required by law, upon what consideration he became interested, or owner of the claim in question.

The first section of the act under which this Court is organized provides—

“It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and the action thereon in Congress, or by any of the departments, if such action has been had; specifying, also, what person or persons are owners thereof, or interested therein, and when and *upon what consideration such person or persons became so interested.*”

It is true that the petition states that the claimant purchased the draft of the public administrator of Savage's estate for the consideration of a like debt due him, as a partner of Savage, from the latter. This statement is not borne out by the proof. Leach swears that he became the owner of the draft in that manner, and that he transferred it to Lewis “for a valuable consideration.”

Here the proof does not sustain the allegation of the petition, and that which is actually made does not conform to the requirements of the statute, which requires the claimant to state fully the contract,

including its consideration, by which he acquired his claim. If untruly stated, his case may fail upon the coming in of the proof.

If this point comes within the rules applicable to amendments, the motion to make the alteration should be made before the taking of the testimony, so that the ground taken can be the subject of proof, before final hearing.

Twelfth. Congress alone can convert this unauthorized and unlawful transaction into a legal and valid one, and make it binding upon the government.

1. If the contract in question had been one authorized by law, the claimant would have found ample remedy by presenting his account and proofs at the proper accounting offices. He does not seem to have applied there with the necessary proofs; and it is presumed for the reason that he knew that the claim rested upon no existing law, and therefore could not be paid.

2. He knew, or was bound to know, that no officer of the government can bind the United States by any engagement he may make without the authority of some law.

Such law need not always be by special statute enactment, or by treaty; still no contract can be binding upon the government unless it is made in pursuance of some express authority, indicated by the words of a law or treaty, or by making appropriations, or in some other clear and certain manner.

It clearly appears here that there was no such law existing at the time of the contracting the debt in question authorizing Wozencraft to enter into the engagement in question.

3. There is no law authorizing any officer of the national government to confirm and make legal what was unauthorized when it transpired.

4. To admit that such legalization could be made, would be conceding unlimited power. If an officer who is not authorized can create a legal obligation, not only without but against law, or otherwise to convert it into a binding obligation, then such unauthorized officer, in effect, is not only equal to, but is really superior to the legislative power of the country.

5. If any act of the Indian Office, or any department, has given legal validity to this unauthorized transaction, the accounting officers can now allow what is due without the intervention of this Court or of Congress.

6. It would prove fatal to the financial welfare of the country if necessity can create a legal liability. If necessity can dictate in one case, it can in every case. In that event the legislative power would not control the extent of our national expenditures. They would be regulated by the necessities of others, even when they were occasioned by wrongful or illegal acts. Such a principle would subvert the laws, and make ours a government of exigencies instead of laws.

Thirteenth. This court cannot allow a claim which does not arise under a subsisting legal authority. It can only declare existing legal rights, and has no authority to recommend the creation of them.

The functions of this Court are distinctly defined in the law under

which it is established. The law provides that "The said Court shall hear and determine all claims founded upon—

"1. Any law of Congress; or,

"2. Upon any regulation of an executive department; or,

"3. Upon any contract—express or implied—with the government of the United States, which may be suggested to it, by a petition filed therein; and,

"4. Also all claims which may be referred to the said Court by either house of Congress."

The objects of this language cannot be easily mistaken. The party who appeals directly to the Court, or who does so through Congress, must establish, if he succeeds at all, a valid legal claim. To show reasons sufficient to control the discretion of Congress on the subject is not sufficient.

A CLAIM is defined to be a demand of right of something in the possession of another, as a title to a debt.

It implies a legal right on the one side, and a legal duty upon the other.

Burrell, in his law dictionary, defines it to be "A challenge or demand, by any man, of property or ownership of a thing, or some interest in it, which he has not in possession, but which is withheld from him unlawfully."

He quotes Cawell; Blount; Litt., § 420; Stowell *vs.* Zouch, Plowd., 359. The latter case contains the same definition.

In *Prigg vs. The Commonwealth of Pennsylvania*, 16 Pet. 539, p. 615, JUSTICE STORY, in delivering the opinion of the Supreme Court, defined a claim to be: "It is, in a just, juridical sense, a demand of some matter of a right made by one person upon another, to do, or to forbear to do, some act or thing as a matter of duty."

He quotes and approves of the definition of Lord Dyer, above referred to in Plowdon, 359.

Bouvier, in his law dictionary, thus defines a claim: "A claim is a challenge of the ownership of a thing which a man has not in possession, and is wrongfully withheld by another."

Apply this definition to the act establishing this Court, and we shall readily see that its duty is to act upon cases presented, and determine whether the government has in its hands, or possession, money belonging to the claimant as a matter of right, which is wrongfully and unlawfully withheld from him.

This is the understanding of the word "claim" when applied to land cases when a party is seeking a patent, and to pensions when a person asks to be placed on the pension list. In all such cases the question is, has the party shown a legal right to what he claims?

This Court, under the law of its creation, is called upon to determine whether the party has a legal right, and not to determine whether Congress shall create one.

The question to be determined is the same, whether the case comes before the Court directly by an original petition, or indirectly by reference from Congress.

The jurisdiction of the Court upon petitions presented directly to it is limited to three cases.

The provision in the act, that the Court may also act upon cases referred by Congress, does not enlarge the boundaries of investigation. They still have to determine whether the government has in its hands what of right belongs to the claimant, and which it unlawfully withholds from him.

If a court has jurisdiction in cases of assumpsit only, but shall be subsequently authorized to hear cases in debt, or account, this enlargement of jurisdiction would not change the object of investigation. That would continue the same, and would be, in both cases, an investigation of the legal rights of the parties.

When the legislative power added to the three enumerated classes of cases those that either house might refer to the Court, it was not its intention to change the investigations and conclusions in the latter cases from a declaration of an existing right of the claimant and of duty on the part of the government to a recommendation to the legislative power to create a right and impose a duty that did not previously exist.

This view is distinctly recognized by the provisions of the 4th section of the act, "that in all cases where it shall appear to the Court that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the Court to authorize the taking any testimony until the same shall have been reported to Congress as is hereafter provided."

This clearly contemplates that no testimony shall be taken where the claimant does not establish a right upon his part and a corresponding duty upon the side of the government.

The 7th section confirms this view when it provides that the Court shall "report to Congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded."

This language is exclusively applicable to cases where the claimant has legal rights, and not to the creation of those rights by legislation. Congress, when called upon to enact a law from motives of humanity or policy, does not need a court to assign reasons for its doing so. Such laws are passed by the exercise of legislative discretion. But when called upon to make an appropriation to discharge a previous liability of the government, it was natural that it shall wish to have the facts found and clearly stated, and the rule of law under which the Court acted, and the reasons for such rule, in unmistakable form.

The 9th section furnishes conclusive evidence upon this point. It provides, when the Court determines against a claimant and Congress confirms the decision, it "shall be conclusive; and the Court shall not at any subsequent period consider said claims unless such reasons shall be presented to said Court as, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial."

This language cannot apply to anything except a claim as I have defined it, and not to matters where the legal right is yet to be created.

At common law and in chancery new trials and rehearings are

only granted in cases where there has been a surprise or an accident which prevented the obtaining the evidence, or the party has discovered new and material evidence, not cumulative, to establish his legal rights against the other party, or when the court, upon further consideration, arrives at the conclusion that it had mistaken the law controlling the question of legal rights involved between the parties.

Neither a court of common law or of equity ever grants a new trial where the party moving for it confessedly has no legal rights which he can assert on the new trial or hearing. New trials and rehearings are always refused where it is apparent to the court that the party cannot establish an existing legal right in his favor.

To grant one when the party concedes he has no such right, would be permitting parties to consume the time of courts where it could not possibly declare and enforce rights between them.

This would be an idle mockery, and is beneath the dignity of judicial proceedings.

In this case no previous liability is established, and therefore the Court cannot report or adjudge that there is anything due to the claimant.

R. H. GILLET, *Solicitor.*

JUNE 7, 1858.

IN THE COURT OF CLAIMS.

MARTIN B. LEWIS *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the Court:

The claim of the petitioner is upon the draft set forth in his petition, as follows:

SAN FRANCISCO, *March* 29, 1852.

Upon the next appropriation by Congress for the Indian department, pay to the order of James D. Savage, for supplies furnished the Indians in fulfilment of treaty stipulations, four thousand two hundred and seventy-eight dollars and fifty cents, (\$4,278 50.)

O. M. WOZENCRAFT,

United States Indian Agent.

Hon. LUKE LEA,

Commissioner of Indian Affairs.

The draft is produced and annexed as exhibit B to the deposition of Lewis Leach, and it is verified by O. M. Wozencraft in his deposition, (answer to second direct interrogatory;) and by the testimony of these witnesses it was given for the flour, set forth in exhibit A, furnished to the Indians on the San Joaquin reservation by J. D. Savage & Company, upon a contract made with them by O. W. Wozencraft, Indian agent and commissioner for the United States.—(Wozencraft's deposition, answers to second interrogatory and to first cross-interrogatory; Leach's deposition, answers to fifth, sixth, sev-

enth, and eighth interrogatories.) Leach was the book-keeper of James D. Savage & Company.

The delivery of the flour is testified to by Lewis Leach, who, in the ninth interrogatory of his deposition, is asked :

Question. Do you know of the delivery of the articles or provisions mentioned in exhibit A ?

Answer. I do ; a portion of the articles were delivered by me, and the balance by Major Savage, in my presence. I cannot say that every sack was delivered in my presence, but most of it was ; but I know the flour was delivered.

And upon his cross-examination he testifies as follows :

Question (13.) What proportion of the articles charged did you deliver ?

Answer. It is impossible for me to say ; but, to the best of my recollection, I delivered about three-fourths of it.

Leach also testifies as follows :

Question, (9th cross.) Did you make the entries in the books of Savage & Company of the items charged in exhibit A at the several dates when charged ?

Answer. I did.

The treaty in fulfilment of which the supplies were furnished was made by the commissioners on the 29th April, 1851.—(Doc. 4, p. 74.) In their report, May 1, 1851, p. 75, the commissioners say :

“ We have found by experience that the best way to keep these Indians of California quiet and peaceable is to give them plenty of food. With beef occasionally, and a little flour to mix with the pulverized acorn, making their favorite *panoli*, nothing can induce them to quarrel with the whites. * * * * *

“ We have, therefore, been under the necessity of making pretty liberal provision under the head of *subsistence*, and now advertise you that this course will have to be pursued throughout the State.”

The receipt of this report is acknowledged by the department June 27, 1851, (Doc. 4, p. 17.)

It is objected that the petitioner is not the lawful owner of the account, because the evidence shows no assignment of the account which formed the consideration of the draft.

But on the evidence the draft was given for the account, and was *prima facie* payment of it, (Bayley on Bills, 248, and notes,) and that is enough for this case, for neither James D. Savage & Company nor an assignee of theirs, without notice to the United States, could recover on the account without producing or accounting for the draft.

It is also objected that the petitioner “ shows no title to the draft in question.” But the evidence shows the draft in the possession of the administrator of Savage’s estate, and that is proof of title in Savage at his death, and his administrator, therefore, could either negotiate the draft by his own endorsement, according to the nature of the instrument and the custom of merchants, or he could assign it as a chose in action.

There is no evidence that the administrator endorsed the draft ; the draft itself exhibits no endorsement by the administrator, and the deposition of Leach only says the draft was “ *transferred* ” and the

certificates of the administrator and the judge of probate only say it was "*delivered*."

The draft itself shows that Savage endorsed it specially to the order of Wells, Fargo & Company, New York; that they endorsed it specially to the order of Riggs & Company, who endorsed it in blanks, and of these endorsements everything is stricken out except the signature of Savage. When or by whom, or why these erasures were made, is not shown by the evidence, nor is it material; the signature of Savage, after his death was not an endorsement, for a delivery is necessary to an endorsement as well as a signature, and both must be by the party having title. After Savage's death the title was in the administrator, and his signature and delivery were necessary to the endorsement. He could not couple his delivery with Savage's signature, for the force of that was extinct, and it could not begin to act as an endorsement after Savage's death. It was as utterly inefficient as if it had been stricken out with the rest of the special endorsement to which it was originally made; and the transfer to Leach, if made as he testifies, was merely the assignment to him for a *bona fide* consideration of a draft, negotiable by endorsement only, and not endorsed. This could not vest in him the legal title; it could only vest in him the equitable title to the draft, and such equitable title, therefore, is all he could assign to the petitioner, and it is all the latter can now claim.

The petitioner, therefore, is before the Court, not as the endorser of a draft, the possession of which is evidence of title, authorizing a suit at law in his own name, but as an assignee of a chose in action, applying to the equity jurisdiction of the Court. And his claim being upon a draft negotiable by endorsement, and not endorsed, the instrument he presents raises a presumption against his claim, and not in favor of it. As the claim is in equity, its substantial merits must be clearly proved according to the rules of procedure in equity.

The title depends on the testimony of Leach. He testifies in his second deposition that the draft was transferred to him by B. B. Harris, administrator of Savage's estate, in payment of a debt due to Leach from that estate, and that he transferred the debt to Lewis for a valuable consideration. This testimony to the title is direct and full; but in his affidavit to the petition Leach swore that the draft was transferred to Lewis for a debt due to him from Savage's estate. If the statement in Leach's second deposition is true, the facts of the title were in his personal knowledge, and his misstatement of them in his affidavit cannot be referred to ignorance or mistake, and inadvertence is not a satisfactory explanation of it, and at the best shows a carelessness in swearing that prevents reliance on his testimony. Besides, it is observable that neither the certificate of the administrator nor of the judge of probate refer to a sale of the draft, or to any consideration for *the delivery* they state. The administrator says: "The said draft was delivered by me to said Leach, and I hold his receipt therefor." Now, of itself, this language does not indicate a sale of the draft, or the transfer of the property in it for a price, but rather a *delivery* of the draft to Leach for some special purpose, he being held responsible for it on the receipt he had given for it. If Leach received the draft, as

he alleges, in payment of a debt, he would, in the ordinary course of business, have given a receipt for the debt discharged, and not for the draft by which it was discharged. And in the certificate of the judge of probate there is no evidence of a sale approved or understood by him. He says: "The *delivery* of the said draft was made with my approval." On the whole evidence we are of opinion that the title is not proved with the clearness required for an equitable title in a court of equity.

But the facts referred to become material under a rule of practice in equity. As the petitioner claims only as an assignee of a chose in action, he must show the assignor, and that is the administrator holding the legal title, a party to the bill or the proceedings here, or produce evidence equivalent to the appearance of the assignor in proving his assent to or knowledge of the title set up in that suit and claimed against his legal title. There is no such proof. Leach's testimony is not sufficient nor proper for the purpose; for in such testimony he is supporting his own title, on which he and the petitioner stand together, and that is the equitable adverse to the legal title. Then the certificate of the administrator is obtained, and that does not indicate a sale of the draft, an assent to the title of the petitioner, or a knowledge of the suit here; nor is it shown for what purpose that certificate was given, nor whether in this or any other, or any suit, and therefore upon the petitioner's evidence of his claim the parties are not before the Court whose presence is necessary to authorize the Court to proceed to judgment.

It is also objected that the claimant has not set forth upon what consideration he became interested in the claim according to the requirement of the statute constituting this Court, (section 1,) which enacts that—

"It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had, specifying also what person or persons are owners thereof, or interested therein, and upon what consideration such person or persons became so interested."

The citation shows the purpose of the statute to be to bring before this Court and before Congress a full statement of all the particulars which may elucidate the merit and position of claims made. And apparently upon the maxim "*dolus latet in generalibus*," it requires particulars to be shown not necessary to be given in evidence to establish a legal demand in a court of common law. Thus, in all cases, claimants must show when and upon what consideration they became interested. But in a court of common law a plaintiff need not show upon what consideration he became entitled to a draft he sues upon, for the draft itself imports a consideration, and that is enough at law, and he may recover without showing whether he paid for the draft or whether it was given to him. But here, by the express requirement of the statute, "*upon what consideration*" the claim arose must be set forth, and specifically, so as to distinguish the consideration given not only in kind but by its circumstances, that they may be put to proof and tested. And generally the best test of the genuineness of title to a claim is the substantial consideration given for it.

In this case the consideration set forth originally in the petition was retracted and another introduced by the evidence, which is Leach's testimony, that he transferred the draft to the petitioner for a valuable consideration; and even this does not specify the consideration in this case, nor distinguish it from any other valuable consideration, nor furnish any circumstances by which it may be tested, and the facts in the case make this proper and show the policy of the statute requirement. Mr. Leach is the only witness to the delivery of any flour, to the amount delivered, and the consequent amount of the claim. He carried the draft and account to the attorney who drew and who signed the petition for the claimant, and Mr. Leach made the verification of the petition. He is the only witness of the title of the petitioner, whose personal action in any part of the case is not shown. Under these circumstances the specification of the consideration, and its circumstances, and the opportunity of their verification by evidence, is required to ascertain the fact of an absolute transfer of the draft from Leach to Lewis, and that the former is not interested in the claim his testimony supports. Such testimony is in the claimant's power, and the language and the purpose of the statute call for its production, and are not complied with without it.

This case is the same in principle as the case of Samuel J. Hensley, heretofore decided by the Court, and for the reasons and considerations therein stated we are of opinion the petitioner is not entitled to the relief he prays for.

GEORGE McDOUGAL.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

GEORGE McDOUGAL *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Depositions filed in the case numbered 1 and 2, transmitted to the House of Representatives.
3. Letter from Commissioner of Indian Affairs, transmitted to the House of Representatives.
4. United States Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Washington, this third day of February,
[L. S.] A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

To the Judges of the Court of Claims of the United States of America, established by act of Congress approved 24th of February, in the year 1855:

Your petitioner, George McDougal, a citizen of the State of California, and therein residing, most respectfully represents to this court:

That in the year 1850 the white men had overspread the greater part of the State of California; had intruded upon the lands occupied by the Indians; had driven them from their dwellings, hunting-

grounds, valleys, and fisheries, into the barren mountains, where even the resource of acorns was wanting to satisfy their craving appetites. By reason whereof the Indians became exceedingly hostile, robbing and murdering the whites, which caused the whites to retaliate, and thus a predatory, sanguinary warfare between the Indians and the white men was raging.

Your petitioner begs leave to refer the Court to the documents published by order of the Senate, of April 15, 1852, 32d Congress, 1st session, Senate Ex. Doc. No. 61, Report of the Secretary of the Interior.

Under these circumstances the government of the United States was called to perform its moral duties of protecting and feeding the Indians, over whom the United States claimed the jurisdiction and authority of a guardian over his ward, and of preventing the whites from obtruding upon lands to which the Indian right of occupancy had not been extinguished, neither to the United States nor to any other government; and also of producing a state of peace between the Indians within the bounds of the State of California and the whites, who were attracted from all parts of the United States, and from foreign lands, in search of gold, which was abundant in the lands occupied by the Indians.

Therefore the Congress of the United States, by act approved September 30, 1850, (9 Statutes at Large, by L. & B., p. 558,) appropriated money "to enable the President to hold treaties with the various Indian tribes in the State of California," and President Fillmore appointed three commissioners, viz., Redick McKee, G. W. Barbour, and O. M. Wozencraft, to hold treaties with the various tribes of Indians in the State of California. The instructions to these commissioners have not been made public, but it is to be presumed that the commissioners had discretionary powers and trusts commensurate with the exigencies, whereby to bring the Indians into a mood to treat, and to pacify them until the President and Senate should approve or disapprove the treaties which should be made.

These commissioners (as your petitioner is informed and believes, and so believing charges) arrived in California early in January, 1851, and entered upon their duties. The Indians would not consent to treat unless their pressing necessities for food were at once relieved and promises given of future supplies. The commissioners soon dissolved the board wherein they were acting jointly, and divided the State into three districts, in which they acted separately. Numerous treaties were made in these districts by the commissioners, jointly and separately, with the various tribes or bands of Indians within the said districts, in each of which cases the Indians were not only furnished with food during the time of treating, but the treaties stipulated for further and future supplies in time to come. These very numerous treaties were, as it is understood, rejected by the Senate, and so they have never been published; wherefore your petitioner cannot now speak of their contents with any greater certainty.

On the 26th day of May, 1852, O. M. Wozencraft, who was one of the commissioners aforesaid, (also an Indian agent,) using the discretionary powers in him vested as commissioner, and by the provisions

of the treaties, and by the pressing wants of the Indians for food, and to prevent them from choosing between starvation or robbery, plunder, and warfare upon the white men, purchased of your petitioner, for the feeding of the Indians in the southern agency of California, six hundred and fifty thousand pounds of beef, at twelve and a half cents per pound, to be paid for in bills to be drawn by the said Wozencraft in his official capacity on the Indian bureau or Secretary of the Interior, at the city of Washington ; and it was then and there further agreed that in the event that Congress should make no appropriation in the year 1852 for payment of the bills, that then your petitioner should have and receive at the rate of fifteen and a half cents per pound for the said beef, inasmuch as the said price of twelve and a half cents was below the usual market price at that time and place, by three cents per pound ; your petitioner being induced to sell at a reduced price for the sake of money in the city of Washington, the rate of exchange between San Francisco and the city of Washington being at that time very high, and bills of approved character on the city of Washington commanded in the city of San Francisco a high premium. This transaction was at the time executed by writings in the words and figures following, viz :

“ United States to George McDougall, Dr.

“ 1852. May 26.—To 650,000 lbs. beef furnished Indians
in southern agency, at 12½ cents per lb. - - - \$81,250 00

“ I certify that the above is just and correct, and that the supplies were for the use of the United States.

“ O. M. WOZENCRAFT,
“ *U. S. Indian Agent.*”

“ Received, San Francisco, May 26, 1852, of O. M. Wozencraft, United States Indian agent, eighty-one thousand two hundred and fifty dollars, (\$81,250,) in full, by drafts on the Indian bureau, for the above account.

“ GEORGE M^cDOUGAL.”

Which writings were signed in duplicate and delivered to said Wozencraft, one of which duplicates was (as your petitioner is informed and believes, and so believing charges) transmitted by said Wozencraft to the Indian bureau, in the city of Washington, and is therein now remaining.

Your petitioner avers that the said quantity of beef was by him actually delivered to said Wozencraft, and thereupon and thereafter the said agent drew the several bills in said receipt alluded to, bearing date on said 26th May, 1852, at San Francisco, in California, and made payable to the order of your petitioner one day after sight ; the several bills, at that time so drawn, amounting together to the said sum of eighty-one thousand two hundred and fifty dollars, (\$81,250,) were presented for payment to the Secretary of the Department of the Interior, who refused to pay the same ; and as your petitioner is informed and believes, the refusal was for want of an appropriation of

money by the Congress wherewith to pay said bills; whereupon the said bills were, in the same year of 1852, viz: on the — day of —, protested by a notary public for non-payment.

Your petitioner states that after the said bills were so protested, the Congress not having made any appropriation for that object, the said Wozencraft, in pursuance of the original agreement, drew another bill in favor of your petitioner, on the Indian bureau, for the sum of nineteen thousand dollars, (\$19,000,) to make up the difference between twelve and a half cents and fifteen and a half cents per pound in the price of said beef, which said last bill was likewise refused to be paid at the Department of the Interior. As to this last bill, your petitioner has been advised by counsel that it cannot be recovered from the United States; that it is in nature of a penalty, (*nomine pœnæ*,) according to the opinion of Lord Chancellor Hardwicke on the petition of Powis, (3 Atk. 520, case 184,) and according to 16 Viner, title Mortgage, letter (M), page 452. But as to this matter your petitioner most respectfully asks the opinion and judgment of this Court.

Your petitioner is advised by counsel learned in the law that, having delivered the beef to the agent of the government, it was not incumbent on him, the vendor and deliverer, to look to its future faithful application to the use of the United States and distribution among the Indians, nevertheless, your petitioner has heard and believes, and so being informed charges, that the said beef, so sold and delivered by him to said Wozencraft, was faithfully applied to the use of the Indians and to the use of the United States.

In order to set forth more fully and particularly his claim above mentioned, and the action of the department thereupon, your petitioner (by his attorneys) made an application, on the 5th October, 1855, to the Department of the Interior and office of Indian affairs for copies of the papers on file in that office relating to said claim, or to withdraw the originals, but received for answer thereto a letter from the Commissioner of Indian Affairs, (Manypenny,) bearing date October 17, 1855, "that the Secretary of the Interior has decided that papers on file here, or copies thereof, intended to be laid before the Court of Claims, can be furnished only under an order of the Court, as provided by the law creating it."

Now, your petitioner is advised to say that, under the Constitution of the United States, ordained to establish justice, it is the duty of public officers, the servants and not the masters of the people, to afford to every citizen, on application, having a claim on the United States, such information as the records, books, and papers of the office contain, to facilitate the citizen in prosecuting his claim in proper and lawful manner to obtain justice; that the government can intend no wrong to a citizen, does not desire to evade its obligations and duties to its citizens, or any one of them, by concealment of the truth or withholding the evidence of facts; that public officers who withhold information whereby a citizen is hindered, delayed, or embarrassed in the pursuit of his right, mistake the character, spirit, intent, and honor of the government, and tarnish its credit, reputation, and dignity.

Your petitioner therefore prays the Court to make an order upon the Secretary of the Department of the Interior, that he furnish to this

Court all the information and papers in the department relating to this claim, herein before mentioned, in full and without reservation.

Your petitioner avers that the price of twelve and a half cents per pound for the beef aforesaid by him sold and delivered to the said agent of the government was, at the time and place, reasonable, and, in truth, below the price usually paid to other vendors, and by purchasers of large quantities of beef; that the usual price was not less than fifteen cents per pound for supplies for the vessels of the United States and private vessels in the port of San Francisco; and that the usual price was, in small quantities or for a single beef, from eighteen to twenty-five cents per pound.

Your petitioner states that similar purchases by the said commissioners, sent to treat with the Indians in California, were made at fifteen cents per pound, for which bills were drawn on the Department of the Interior, and all protested for want of appropriations. The treaties being all rejected by the Senate, no appropriations were asked for to carry them into execution. But in the case of Colonel Frémont, who sold a large quantity of beef at fifteen cents per pound to Commissioner Barbour, for the supply of food to the Indians, and whose bills were likewise protested, the Congress of the United States, before this Court was established, viz: in the year 1854, ordered payment of the said protested bills. Upon this subject your petitioner refers to Senate documents, 33d Congress 1st session, 1853-'54, Doc. No. 69; 32d Congress 1st session, Docs. No. 61-'5, and 14, 15, and 16; and the act for paying Colonel Frémont, approved July 9, 1854.—(Stat. at Large, by Little & Brown, private acts, page 80, chapter 165.)

Your petitioner avers that he has as yet received no payment whatever for any part of the beef so sold and delivered; that all the said bills remain unpaid; and that he is the sole owner thereof.

He relies—

1st. Upon the necessity of the supply aforesaid to the Indians.

2d. Upon the contract and delivery of the beef, and bills drawn by the agent of the United States.

3d. Upon the social duties and moral obligations of the United States to the said Indians, arising out of the political connexion and relations between the United States and the tribes of Indians within the boundaries of the United States, as explained in the case of the Cherokee Nation *vs.* The State of Georgia, (5 Peters, 17.)

4th. Upon the implied sense and assumpsit of the United States arising out of the report of the committee in Colonel Frémont's case, and the adoption of the principles of that report by Congress in the passage of the act for paying Colonel Frémont before referred to.

Upon the premises, your petitioner prays for general relief and decree as he may, in the opinion of this honorable Court, be entitled to have upon the final hearing of his case.

ROBERT ROSE and
GEORGE M. BIBB,
For petitioner.
GEORGE M'DOUGAL.

Affidavit to petition.

DISTRICT OF COLUMBIA, CITY OF WASHINGTON,
February 15, 1856.

Before me, the undersigned, one of the justices of the peace of the United States, in and for the city of Washington aforesaid, duly commissioned, sworn and acting as such, this day came ———, and made oath that, from inspection of public documents and other writings and information, he verily believes that the statements in the foregoing petition of George McDougal, as therein alleged, are true in substance and fact.

ROBERT ROSE.

Subscribed and sworn to before me on the day, year, and place stated in the caption.

N. CALLAN, J. P., [L. S.]
Washington city, D. C.

No. 1.

LOS ANGELES, May 17, 1852.

Received of George McDougal, the contracting party for supplying the "Cow-we-ha," "San Louis" and "Dieganian" tribes of Indians with beef cattle, one thousand head of cattle averaging six hundred and fifty pounds weight each.

J. S. RUCKEL,
United States Indian trader for the
"San Louis" Indians and "Dieganians."

STEPHEN HUTCHINSON,
United States Indian trader
for the Cow-we-has tribe of Indians.

United States to George McDougal, Dr.

May 26, 1852.—To 650,000 lbs. beef furnished Indians in
the southern agency, at 12½ cents per lb..... \$81,250

I hereby certify that the above is just and correct, and that the supplies were for the use of the United States.

O. M. WOZENCRAFT, U. S. Indian Agent.

Received, San Francisco, May 26, 1852, of O. M. Wozencraft, United States Indian agent, eighty-one thousand two hundred and fifty dollars (\$81,250) in full (by drafts on the Indian bureau) for the above account.

GEORGE M^cDOUGAL.

I acknowledge the above signature of O. M. Wozencraft to be genuine.

M. BLAIR, Solicitor.

IN THE COURT OF CLAIMS.

GEORGE MCDUGAL *vs.* THE UNITED STATES.

The additional testimony of Oliver M. Wosencraft, on the part of the claimant.

1st interrogatory. Look at the paper herewith annexed, marked Petitioner's Exhibit X, and signed George McDougal, purporting to be a receipt for eighty-one thousand two hundred and fifty dollars, upon which also is a certificate purporting to be signed by your name, and say whether the signature of George McDougal is genuine?

Answer. It is genuine.

2d interrogatory. How do you know?

Answer. I saw him sign it, and received it thus signed from his hands.

3d interrogatory. Is the bill, certificate, and signature upon the same paper in your handwriting?

Answer. They are.

4th interrogatory. Are you acquainted with the handwriting and signatures of J. S. Ruckel and Stephen Hutchinson?

Answer. I am.

5th interrogatory. Have you seen them write; if yea, how often?

Answer. I have seen Mr. Ruckel write frequently, and Stephen Hutchinson several times. I derive my knowledge of the handwriting of these individuals from having seen them write, and from correspondence with them, Mr. Ruckel particularly.

6th interrogatory. Look at the paper marked Petitioner's Exhibit Z, and say whether, according to the best of your knowledge, the signature purporting to be the signature of J. S. Ruckel is his genuine signature?

Answer. It is his genuine signature.

7th interrogatory. Look at the same paper, and say whether, according to the best of your knowledge and belief, the signature purporting to be the signature of Stephen Hutchinson is his genuine signature?

Answer. It is his genuine signature.

8th interrogatory. Do you know any other matter relative to the claim in question?

Answer. Nothing.

O. M. WOZENCRAFT.

UNITED STATES, }
District of Columbia, } *sct.*

On this 3d day of April, A. D. 1856, personally came Oliver M. Wozencraft, (a witness heretofore examined in this cause,) and being again first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, who then subscribed the deposition in the presence of the commissioner. The additional deposition of Oliver M. Wozencraft, taken at the request of Robert Rose, esq., attorney for the petitioner,

to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of George McDougal. The adverse party was notified, did not attend, and did not object.

JOHN S. TYSON, *Commissioner*.

No. 2.

IN THE COURT OF CLAIMS,

GEORGE MCDUGAL *vs.* THE UNITED STATES.

Interrogatories to a witness on the part of the petitioner.

1st interrogatory. What is your name?

Answer. Oliver M. Wozencraft.

2d interrogatory. What is your occupation?

Answer. I am a physician.

3d interrogatory. What is your age?

Answer. Forty-two.

4th interrogatory. What has been your place of residence during the past year?

Answer. California—that is, San Francisco, in that State.

5th interrogatory. Have you any interest, direct or indirect, in the claim which is the subject of the present inquiry?

Answer. I have not.

6th interrogatory. Are you in any degree related to the claimant? If yea, please state in what degree you are so related.

Answer. I am not in any degree.

7th interrogatory. Had you at any time any office or appointment in relation to the Indians in California? If yea, please state when you received such office and appointment, and during what space of time you exercised them, and what they were.

Answer. In the autumn of 1850 I received the appointment of Indian agent, also that of one of the commissioners to make treaties with the Indians in California. I held the office of commissioner about one year, and that of Indian agent two years.

8th interrogatory. Were not the Indians of California during the winter of 1850 and beginning of 1851 very much in want of food? If yea, please state particularly their condition in this respect.

Answer. The Indians of California were very much in want of food in the winter of 1850 and 1851. They were actually in a state of starvation.

9th interrogatory. Did Commissioners G. W. Barbour, R. McKee, and yourself make a treaty or treaties with some of the southern tribes of Indians in California, stipulating to furnish the tribe or tribes with beef and flour for subsisting them in the years 1851 and 1852?

Answer. We did.

10th interrogatory. Did one or more of the commissioners, and which, cause supplies of beef to be purchased of George McDougal to a large amount under any of those treaties? If yea, state who caused it, and all particulars relative thereto.

Answer. I caused supplies of beef to be purchased of George McDougal under said treaties for various tribes of Indians in the lower part of the State of California. The quantity delivered was six hundred and fifty thousand pounds, at twelve and a half cents per pound, if paid at the then ensuing session of Congress; and if not, fifteen cents per pound.

11th interrogatory. In what mode did you contract to pay for said beef, and did you fulfill your contract? State particularly.

Answer. I agreed to draw drafts for the amount on the Indian bureau, which was done. I drew drafts for sums amounting to eighty-one thousand two hundred and fifty dollars, and subsequently, in addition, a draft for nineteen thousand dollars, which was the price of the beef delivered by the petitioner.

12th interrogatory. Was said beef actually slaughtered and delivered to the Indians aforesaid?

Answer. It was.

13th interrogatory. Was the price aforesaid of twelve and a half cents per pound, given as aforesaid to McDougal, the ascertained market price of beef at the time and place of delivery?

Answer. It was at that time and in that part of California.

14th interrogatory. At the time when you arrived in California with the other commissioners were there or not actual hostilities between the Indians and whites in California?

Answer. We arrived about the beginning of January, 1851, at which time, or thereabouts, there was waging a violent, bloody, and destructive war between the Indians and the whites.

15th interrogatory. What effect had the furnishing of those Indians with supplies, according to treaty, towards pacifying them?

Answer. The granting those supplies at once produced and perpetuated peace. There have been no mutual hostilities since, or any outbreak on the part of those Indians.

Cross-interrogatories on the part of the United States by the Solicitor of the Court of Claims.

1st interrogatory. What authority had you to enter into the contract spoken of in your examination in chief?

Answer. My authority was a commission from the President of the United States to myself and two other commissioners to make such treaties and compacts with the Indians of California as we or either of us might deem just and proper.

2d interrogatory. Did Mr. McDougal know that you knew that you had no authority to make such contracts?

Answer. He did not, nor did I, because such was not the fact.

3d interrogatory. When you spoke of the quantity of beef butchered and delivered, did you speak of facts within your personal knowledge, or from the reports of your employés or subordinates?

Answer. From the reports of my subordinates.

4th cross-interrogatory. Give the number or amount that you know of your own knowledge to have been fed to the Indians, either whilst you were in office or under your successor, Beale?

Answer. The amount which I know of my own knowledge is derived through my subordinates to have been fed to those southern Indians, whilst I was in office, was six hundred and fifty thousand pounds. There was no portion of this turned over to Beale.

5th interrogatory. State what other contracts you entered into for the same purpose, and the amounts agreed to be paid for such objects.

Answer. I entered into several. One with Dent, Vantyne & Co., at fifteen cents per pound; one with Samuel Norris at twenty cents per pound; and one with Major Hensley, at fifteen cents per pound.

6th interrogatory. How many Indians were there who received these provisions, and during what time were they fed?

Answer. If the interrogatory applies to all the Indians of California fed under treaty, I say they were from seventy-five to one hundred thousand. If to the southern Indians, I say the number was between five and six thousand. They were fed in the years 1851 and 1852; these southern Indians were fed entirely in 1852.

Interrogatory by the Commissioner:

Do you know any other matter relative to the claim in question?

Answer. I know nothing.

O. W. WOZENCRAFT.

DEPARTMENT OF THE INTERIOR,
Office Indian Affairs, April 28, 1856.

SIR: Your letter of the 10th instant, enclosing a certified copy from the records of the Court of Claims, addressed to the Secretary of the Interior, having been referred to this office for the action therein required, I have, in reply, to enclose a certified copy of a voucher embraced in an abstract of liabilities for provisions, &c., furnished Indians in California, reported to the department by O. M. Wozencraft, late agent, &c., and to state that this is the only voucher appearing in favor of George McDougal. The abstract, however, carries on its face an additional amount of \$19,500 in his favor, "to be allowed as per contract;" but as no contract or other documents are found of file in this office, it is not in my power to explain the terms upon which this additional amount was to be allowed.

Very respectfully, your obedient servant,

GEO. W. MANYPENNY,
Commissioner.

SAMUEL H. HUNTINGTON, Esq.,
Chief Clerk Court of Claims, Washington City.

United States to George McDougal.

Dr.

May 26, 1852. To 650,000 pounds beef furnished Indians in
southern agency, California, at 12½ cents
per pound \$81,250

I certify that the above is just and correct, and that the supplies were for the use of the United States.

O. M. WOZENCRAFT,
U. S. Indian Agent.

Received, San Francisco, May 26, 1852, of O. M. Wozencraft, United States Indian agent, eighty-one thousand two hundred and fifty dollars, (\$81,250,) in full, (by draft on the Indian Bureau,) for the above account.

GEORGE McDOUGAL.

OFFICE INDIAN AFFAIRS, *April 28, 1856.*

I certify that the above is a true copy.

GEO. W. MANYPENNY,
Commissioner.

IN THE COURT OF CLAIMS.—No. 503.

GEORGE McDOUGAL *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

Besides the testimony taken in this case, and yet unprinted, the following public documents of Congress will be referred to, viz:

Doc. 1, Senate, 2d session 31st Congress, Annual Rep. Sec. Int.
61, Senate, 1st session 32d Congress, Debts contracted by Indian Agents, &c.

4, Senate, sp. sess. 1853, Correspondence with Indian Agents.

Which will be hereafter briefly designated as documents 1, 61, 4.

On or before the 14th of October, 1849, Adam Johnston was appointed sub-Indian agent on the Sacramento and San Joaquin rivers, in California, to include the Indians at or in the vicinity of those places, and any others to be subsequently designated by the Indian Department.—(Com. Ind. Aff. to Johnston, Oct. 14, 1849, Doc. 4, p. 2.) This sub-agency was subsequently restricted to the Indians “in the valley of San Joaquin.”—(Com. Ind. Aff. to Johnston, November 24, 1849, Doc. 4, p. 5; also pp. 4, 6.)

It seems this appointment was made under the 5th section of the act organizing the department of Indian Affairs, approved June 30, 1834.—(4 Stat., 735.)

By act of September 28, 1850, (9 Stat., 519,) the President was authorized to appoint three Indian agents for California, and by an act approved September 30, 1850, (9 Stat., 558,) an appropriation of \$25,000 was made, “to enable the President to hold treaties with the various Indian tribes in the State of California.”

George W. Barbour, Redick McKee, and O. M. Wozencraft were appointed agents under the act of September 28, 1850, but it being soon discovered that no appropriation had been made for their salaries, their functions and salaries as Indian agents for California were suspended; and they were appointed, under act of September 30, commissioners to treat with the Indians.—(Doc. 1, p. 29.) The instructions to them, dated October 15, 1850, as commissioners, are printed in Doc. 4, p. 8. The appropriation of \$25,000 was then remitted them.

By an act approved February 27, 1851, sec. 3, (9 Stat., 586,) it was enacted, that “hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose.” The provisions of this act were communicated to the commissioners by the Commissioner of Indian Affairs, in a letter dated April 12, 1851, (Doc. 4, p. 14,) whereby they were informed that their offices and functions as commissioners were abrogated and annulled; they were, however, directed not to suspend negotiations, but to enter upon their appointments as agents, and were, *as such*, designated [under the act of 1851] to negotiate with the Indians of California, under the instructions already given.

This letter was received by the commissioners in San Francisco, early in June, 1851.—(Doc. 4, p. 130.)

By act of March 3, 1851, (9 Stat., 572,) a further appropriation of \$25,000 was made for expenses of treating with Indians in California, which was remitted to them by the Commissioner of Indian Affairs, June 25, 1851.—(Doc. 4, p. 17.)

On the 27th of June, 1851, (Doc. 4, p. 17,) the Commissioner of Indian Affairs wrote to the commissioners, that the two appropriations of \$25,000 each constituted all the money applicable to the negotiation of treaties in California; and he said, “when the funds referred to have been exhausted, you will close negotiations and proceed with the discharge of your duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress.” This letter reached McKee September 14, near Humboldt river, (p. 186,) Barbour, at San Francisco, in September, (p. 260,) and Wozencraft, on the Sacramento river, September 2.—(p. 180.)

The commissioners arrived at San Francisco between the 27th of December, 1850, and January 8, 1851, (Doc. 4, p. 53,) and soon after started southward up the valley of the San Joaquin, meeting and treating with the Indian tribes of the valley.—(Doc. 4, pp. 54 to 76.) Arrived near the head of the valley, at Camp Barbour, May 1, (Doc. 4, p. 76,) they concluded to separate and act individually in their several districts, which had been determined by lot. Barbour took the southern district, Wozencraft the middle district, and McKee the northern district.

This division was communicated to the Commissioner of Indian Affairs, by letters of May 1 and 13, 1851, (Doc. 4, p. 77,) and approved by him June 27, 1851.—(Doc. 4, p. 17.)

From Camp Barbour Wozencraft returned to San Francisco, May 13,

and on the 24th left again to visit and treat with the Indians in the northern part of his district. From this he returned to San Francisco on or before the 30th of September.—(Doc. 4, p. 187.) Besides what cash he had expended, he had incurred debts for provisions furnished to Indians, up to September 16, to the amount of \$60,060.—(Doc. 4, p. 189.)

This sum alone exceeded the whole appropriation, and he had previously, as above shown, received the letter of the Commissioner of Indian Affairs, of June 27, 1851, directing him in that event to cease negotiation. From this date forward, therefore, September 16, 1851, he had no authority except as "agent simply."

The claim of McDougal arose long after this date.

The claimant produces a receipt of Puckett & Henderson, Indian traders at Tulare lake, for 1,000 head of cattle, averaging 650 pounds, delivered for the use of certain tribes of Indians. This receipt is dated May 17, 1852; and on the 26th of the same month McDougal stated an account against the United States for that quantity of beef, amounting, at 12½ cents, to \$81,250, which Wozencraft, at San Francisco, certified to be correct, and for which he drew drafts upon the Secretary of the Interior. Those drafts are not produced.

No previous contract or understanding in regard to the beef is alleged in the petition or disclosed in the evidence; nor is there any evidence that it was ever issued to the Indians, except Wozencraft's statement that it was so reported to him by his subordinates, who were, no doubt, the traders in question.

This beef, however, certainly was not delivered in May, for in Wozencraft's report of June 23, 1852, (Doc. 4, p. 339,) he speaks of the cattle "being delivered by Colonel George McDougal in the south." The allegations in the petition, as to price and other particulars, identify these as the cattle in question.—(See, also, Doc. 4, p. 398.)

The southern Indians were not in Wozencraft's agency, but in Barbour's. Wozencraft indeed claims, in his correspondence, that Barbour, on returning to the east, had left him in charge of it; but Barbour could not delegate his authority.

It is not proven that the Indians were entitled to receive this supply of beef under any agreement made with them by the commissioners or either of them; but even if they were, it is contended that no authority was given to the commissioners to do more than was necessary to conclude treaties; that this authority did not extend beyond the conclusion of the treaties—i. e., the commissioners could not, under the authority to conclude the treaties, agree with the Indians, as an inducement to accept terms, that the treaties themselves should be fulfilled before being ratified by the Senate, or even being forwarded to the President.—(See letters of Commissioner of Indian Affairs to them, June 25, 1851, and July 16, 1851; Doc. 4, pp. 17 and 18.)

The solicitor maintains that the commissioners had no authority to make contracts beyond what was expressly or impliedly given in their written instructions.

That if they had any such authority as commissioners, it was taken away by the act of February 27, 1851.

Or, if not by that act, then by the instructions of April 12, 1851, even if given under an erroneous construction of the act, (*U. S. vs. Eliason*, 16 Pet., 291:)

And that all authority to negotiate treaties ceased under instructions of June 27, 1851, on or before September 30, 1851.

It is further contended that the contract with McDougal is void, being made contrary to the act of May 1, 1820, (sec. 6, 3 Stat., 568,) which prohibits any contracts, except such as are made under a law authorizing the same, or where there are appropriations adequate to their fulfillment.

And again: being made contrary to the provisions of the act of June 30, 1834, (sec. 13, 4 Stat., 757,) which prescribes the mode of purchasing goods for indians.

And again: if these acts should not be held to apply, objection is further made for non conformity to the act of March 3, 1809, (2 Stat., 536,) as construed by Attorney General Berrien, August 29, 1829.

It is claimed by the petitioners that the relation of the government to the Indians is similar to that of guardian to his ward; and it is, therefore, bound for necessities furnished. If so, those who claim to have furnished necessities must prove the necessity, (*Chitty Cont.*, 117, and cases there cited,) and that the government has funds of these wards in possession to pay the debt. But we deny the existence of that relation, and contend that the duty of the government to the Indians is one of imperfect obligation, and one which Congress only can acknowledge and discharge.

The solicitor denies that Wozencraft had authority to purchase the cattle from McDougal.

He denies that the Indians for whom it was purchased needed the beef for their subsistence.

He denies that all the beef was delivered according to contract.

And he denies that any of it ever came into the possession of any officer or agent of the United States.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

GEORGE MCDUGAL *vs.* THE UNITED STATES.

George McDougal claims upon a contract made with him by M. O. Wozencraft, on the part of the United States, in May, 1852, for supplies of beef to be furnished to the Indians in the lower part or southern agency of the State of California, at twelve and a half cents per pound, if paid for at the then ensuing session of Congress; if not then, at fifteen and a half cents per pound, payment to be made by bills drawn by M. O. Wozencraft on the Indian Bureau or Secretary of the Interior at Washington.

The petitioner then alleged that under this contract six hundred and fifty thousand pounds of beef were furnished and delivered by him to M. O. Wozencraft, for which that gentleman drew bills on the

department, first, for \$81,250, the price of the beef at twelve and a half cents per pound, and afterward for \$1,900 more to make up the price at fifteen cents per pound; all of which bills the department refused to pay.

From the evidence (the receipts of Ruckel and Hutchinson prefixed to Mr. Wozencraft's deposition, taken 3d of April, 1856,) it appears that the beef is claimed as furnished to Cow-we-has, San Louis, and Dieganian Indians. But Mr. Wozencraft's report to the department, (Doc. 4, pp. 285-288,) shows that the treaty with those Indians was made after 25th December, 1851, and therefore after Mr. Wozencraft knew, (as appears by his letter, December 1, 1851, Doc. 4, pp. 229, 230,) that the appropriation of \$50,000 had been exhausted; and that consequently his power "to hold treaties" was annulled by the instructions from the department, dated June 27, 1850, which he had received September 2, 1850, (Doc. 4, p. 180.) So that the treaty, for the fulfilment of which these supplies are claimed, was made against the most explicit instructions.

The evidence of the delivery of the beef under the contract is—

1st. Mr. Wozencraft's receipt, (Exhibit X, prefixed to his deposition of April 3, 1856,) of 650,000 pounds of beef, at \$81,250; and his answer to the twelfth direct interrogatory in his deposition, marked O. M. W., No. 1. But the force of this testimony is entirely destroyed by his answer to the fourth cross-interrogatory in that deposition, to the effect that he had no personal knowledge of the delivery, and by his answers to Lieutenant Beale.—(Doc. 4, p. 368.)

The other evidence of the delivery of the beef is a receipt of Ruckel and Hutchinson, (Exhibit Z,) as follows:

LOS ANGELOS, *May 17, 1852.*

Received of George McDougal, the contracting party for supplying the Cow-we-has, San Louis and Dieganian tribes of Indians with beef cattle, one thousand head of cattle, averaging six hundred and fifty pounds weight each.

J. S. RUCKEL,

U. S. Indian trader for the San Louis and Dieganian Indians.

STEPHEN HUTCHINSON,

U. S. Indian trader for the Cow-we-has tribe of Indians.

As the testimony of witnesses this receipt is not evidence, for it is not testimony under oath. And as an admission it is not efficient, for there is no evidence in the case that Ruckel and Hutchinson were authorized to receive or receipt for the beef for the United States; and there is nothing in the case from which this can be inferred, except that Mr. Wozencraft, in 1856, four years after the transaction, verifies their signatures, and *does no more.*

By the receipt Ruckel and Hutchinson are traders for different tribes; yet the receipt does not exhibit any appropriation or quotas for these tribes, but purports that these traders, jointly, received the whole quantity of beef claimed for, 650,000 pounds, at one time, May 17, 1852; while Mr. Wozencraft's report, June 23, 1852, (Doc. 4,

339,) shows that McDougal was then delivering the beef under this contract.

The receipt also states that the delivery was of "one thousand head of cattle, averaging six hundred and fifty pounds weight each;" while other evidence tends to show that the average weight of cattle in California did not exceed five hundred pounds weight each, on the largest estimate.—(Doc. 61, pp. 6, 11, 17; Doc. 4, p. 341.)

Then the petitioner in his petition and evidence, (Exhibit X,) sets forth a receipt given by him to Mr. Wozencraft, thus:

"Received, San Francisco, May 26th, 1852, of O. M. Wozencraft, United States Indian agent, eighty-one thousand two hundred and fifty dollars, (\$81,250,) in full by drafts on the Indian Bureau for the above account.

"GEORGE McDOUGAL."

By this document the "account" was settled by the bills given for it, and by the arrangement between the parties those bills or drafts were to be the ground of claim. They were negotiable, for they were payable to Mr. McDougal's order, (petition, p. 3,) and their negotiation by him would transfer his interest in the claim. The bills are not produced, nor are they accounted for, except by the averment, (petition 5,) "that he is the sole owner thereof," and of this averment there is no proof.

This case is the same in principle as the case of Samuel J. Hensley, heretofore decided by this Court, and for the reasons and considerations therein stated, we are of opinion that the petitioner is not entitled to the relief he prays for.

THOMAS FILLEBROWN.

[To accompany Bill H. R. No. 91.]

FEBRUARY 3, 1859.—Referred to the Committee of Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of

THOMAS FILLEBROWN *vs.* THE UNITED STATES.

1. The petition of the claimant and amended petition.
2. Report of the case of United States *vs.* Thomas Fillebrown, jr., filed by claimant as evidence, and transmitted to House of Representatives.
3. Petitioner's brief.
4. United States Solicitor's brief.
5. Opinion of the Court in favor of the claim.
6. Bill allowing claimant four hundred and thirty dollars.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said Court, at Washington, this 3d day of February,
A. D. 1857.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Court of Claims :

The petition of the undersigned, a citizen of the United States, now and for the last thirty-five years a resident of the city of Washington, respectfully represents : That in the year 1825 he was a clerk in the Navy Department, at a salary of one thousand dollars per annum. In the month of November of that year he was selected by the commissioners of navy hospitals, composed *ex officio* of the Secretaries of the Navy, Treasury, and War Departments, to act as their secretary, for which service a compensation of two hundred and fifty dollars per

annum was allowed him. Subsequently he was called on to disburse certain moneys in the construction of navy hospital buildings. For this extra service he charged and was allowed a commission of one per centum. In the year 1829 he was discharged from all his employments, and suit instituted against him to recover the sums thus charged and received as commissions on his expenditures. The suit resulted in a verdict of the jury in his favor, on which the court entered a judgment, and in a certificate by the jury awarding him the sum of \$430. From this decision of the circuit court of the District of Columbia the government appealed to the Supreme Court of the United States, where the same was argued at the December term of 1832, and the judgment of the circuit court was affirmed. He then applied to the Secretary of the Navy for payment of the balance certified by the jury to be due him, and was informed by that functionary that the same could not be paid without the sanction of, or an appropriation by, Congress. Thus situated, he appealed to Congress by petition to the Senate, which body passed a bill for his relief, which bill was rejected by the House of Representatives. He again petitioned the 24th Congress, 1st session, upon which there appears to have been no action. At the second session a favorable report was made upon his claim. At the second session of the 25th Congress he again petitioned, and upon which a favorable report was made; and also at the third session of the same Congress, with the same result. At the first session of the 26th Congress he renewed his petition, and a bill for his relief was passed by the House, but was indefinitely postponed in the Senate.

A few days after his case was decided by the Supreme Court, the Attorney General (now Chief Justice Taney) addressed a letter to the Secretary of the Navy, recommending that the balance certified by the jury to be due your petitioner should be paid; which letter may be found in the volume of "Opinions of the Attorneys General of the United States, published in 1841, under the inspection of Henry D. Gilpin," page 900, copy of which is hereto appended. He also refers the honorable court to the opinion of the Supreme Court in the case, found in Peters' Report, vol. 7, pp. 42-50.

He has not assigned this claim, or any part or portion of it, to any person or persons whatever, nor is it his intention or purpose so to do, and prays such measures may be taken by the Court as will secure its payment eventually to himself or his heirs.

And, as in duty bound, he will ever pray.

THOMAS FILLEBROWN.

ATTORNEY GENERAL'S OFFICE, *March* 19, 1833.

SIR: In reply to your inquiry concerning the claim of Mr. Fillebrown, I have the honor to send you a copy of the opinion given by the Supreme Court, at the late term, in the case of the United States against him: The Court have decided that, under the agreement set forth in the testimony of Mr. Southard, Mr. Fillebrown was entitled to such commission as the jury should find to be reasonable and con-

formable to the general usage of the government and its departments in the like cases.

It appears by the verdict that the jury must have found the contract to have been as proved by Mr. Southard; and in that state of the fact Mr. Fillebrown is, by the opinion of the Court, entitled to the per centage and salary claimed in his account, provided the commissioner's charges conform to the amount at that time usually allowed by the government in like cases. I think, therefore, that he is entitled to receive out of the navy hospital fund the amount due him, adjusting his account according to the rights and obligations of the parties, as decided by the Court.

R. B. TANEY.

The SECRETARY OF THE NAVY.

IN THE UNITED STATES COURT OF CLAIMS.

THOMAS FILLEBROWN *vs.* THE UNITED STATES.

Amended Petition.

Thomas Fillebrown, by way of amendment to his original petition hereinbefore filed, and in order to set forth more specifically the action had upon his claim while pending before Congress, in obedience to the rules prescribed by this Court, respectfully presents:

That after he was dismissed from his employment by the "commissioners of navy hospitals," say about the month of May or June, 1829, he was arrested by the government, charged with being a defaulter, and required to give bail in the sum of \$5,000 to keep his body from being lodged in prison.

The suit brought against him by the government being slow in its progress, and not likely soon to be tried; and deprived of his accustomed employment, besides his character and reputation resting under charges degrading to him as a man; and feeling also conscious that *he was not a defaulter*, but, on the contrary, that the government justly owed him; and wishing to hasten a final determination of the matter, as well as to relieve himself of the false imputations and charges under which he labored, which greatly obstructed his usefulness to himself and a dependent family, he was advised to and did petition to Congress for a thorough investigation of his official transactions, with a prayer to allow him such sum as might appear equitable and just, upon the same principle that had been allowed others who had performed service similar to his own.

But the government refused to permit Congress to dispose of the matter, and forced him to encounter and defend its suit at law in the United States circuit court for the District of Columbia. He thereupon, having no other alternative, prepared for his defence, and, pleading as an offset his claim for his services rendered, and which had been allowed by the "commissioners" but refused by the Fourth Auditor, asked for a judgment in his favor. The cause in due time came on for a hearing, when the proofs, *pro* and *con*, were submitted to a select jury, who ren-

dered a verdict in his favor for the sum of \$430, as in his original petition stated.

When he first petitioned to Congress he claimed and expected to get a much larger sum than was allowed him by the jury; and therefore, after the rendition of the verdict in his favor, to wit, in the month of April, 1832, he again petitioned Congress for the payment of the verdict, and for the additional amount thereto, not allowed him by the jury, but asked for in his petition first presented, in January, 1830.

Upon this last petition various reports were made for and two against his claim as presented, and a bill was more than once passed in one or the other branches of Congress for his relief, the last of which, having passed in the House, was indefinitely postponed in the Senate.

He presents herewith an extract from the proceedings of the two houses, marked A No. 1 and A No. 2, which will be found corroborative of his statements now made.

A No. 1.

Extracts from the Journals of the Senate.

1st Session 21st Congress.

MONDAY, January 18, 1830.

* * * * *

Mr. Holmes presented the memorial of Thomas Fillebrown, junior, praying for an equitable settlement of his accounts for commissions on disbursements made by him from the navy hospital fund by order of the commissioners.

Ordered, That the petition and memorial last mentioned be referred to the Committee on the Judiciary.

* * * * *

TUESDAY, February 23, 1830.

* * * * *

On motion by Mr. Rowan,

Ordered, That the Committee on the Judiciary be discharged from the consideration of the memorials of Thomas F. Gordon and Jesper Harding and Thomas Fillebrown.

* * * * *

1st Session 22d Congress.

TUESDAY, April 3, 1832.

* * * * *

Mr. Sprague presented the petition of Thomas Fillebrown, jr., late disbursing agent of the board of commissioners of navy hospitals, praying for additional allowances for his services; and

Ordered, That it be referred to the Committee on the Judiciary.

* * * * *

FRIDAY, *April 6*, 1832.

* * * * *

On motion by Mr. Marcy,

Ordered, That the Committee on the Judiciary be discharged from the further consideration of the petition of Thomas Fillebrown, jr.

* * * * *

1st Session 23d Congress.

WEDNESDAY, *December 18*, 1833.

* * * * *

Mr. Sprague presented the petition of Thomas Fillebrown, jr., praying for an additional allowance for disbursing the navy hospital fund.

* * * * *

Ordered, That the four petitions last mentioned be referred to the Committee on Claims.

* * * * *

TUESDAY, *January 7*, 1834.

* * * * *

Mr. Bell, from the same committee, to whom was referred the memorial of Thomas Fillebrown, jr., made a report, accompanied by a bill for his relief. The bill was read; and

Ordered, That it pass to a second reading, and that the report be printed.

* * * * *

FRIDAY, *April 4*, 1834.

* * * * *

On motion by Mr. Sprague,

The Senate resumed, as in Committee of the Whole, the bill for the relief of Thomas Fillebrown, jr., and no amendment having been proposed, it was reported to the Senate; and

Ordered, That it be engrossed and read a third time.

* * * * *

MONDAY, *April 7*, 1834.

* * * * *

The bill for the relief of Thomas Fillebrown, jr.,

* * * * *

having been reported by the committee correctly engrossed, were severally read the third time; and

Resolved, That they pass, and that their respective titles be as aforesaid.

Ordered, That the Secretary request the concurrence of the House of Representatives in said bills.

* * * * *

MONDAY, *June 30*, 1834.

* * * * *

A message from the House of Representatives, by Mr. Franklin, their Clerk.

Mr. President: The House of Representatives have rejected bills from the Senate of the following titles, viz:

* * * * *

An act for the relief of Thomas Fillebrown, jr.

* * * * *

2d Session 23d Congress.

THURSDAY, *January 15*, 1835.

* * * * *

On motion by Mr. Bell,

Ordered, That Thomas Fillebrown, jr., have leave to withdraw from the files of the last session his petition and papers.

* * * * *

2d Session 25th Congress.

THURSDAY, *April 5*, 1838.

* * * * *

A message from the House of Representatives, by Mr. Franklin, their Clerk.

Mr. President:

* * * * *

They have passed a bill (H. R. 81) entitled "An act for the relief of Thomas Fillebrown, jr.," in which they request the concurrence of the Senate.

The last mentioned bill from the House of Representatives was read the first and second time, by unanimous consent, and referred to the Committee on Claims.

* * * * *

TUESDAY, *May 22*, 1838.

* * * * *

Mr. Merrick, from the Committee on Claims, to whom was referred the bill (H. R. 81) for the relief of Thomas Fillebrown, jr., reported it without amendment.

* * * * *

SATURDAY, *July 7*, 1838.

* * * * *

The Senate proceeded to consider, as in Committee of the Whole, the bill (H. R. 81) for the relief of Thomas Fillebrown, jr.; and

On motion by Mr. Buchanan,

Ordered, That it lie on the table.

* * * * *

1st Session 26th Congress.

MONDAY, *March* 30, 1840.

* * * * *

A message from the House of Representatives, by Mr. Garland, their Clerk.

Mr. President: The House of Representatives have passed bills of the following titles :

* * * * *

H. R. 44. "An act for the relief of Thomas Fillebrown, jr."

* * * * *

The said bills from the House of Representatives were severally read the first and second time, by unanimous consent.

Ordered, * * * * *
that bills numbered from 28 to 48 be referred to the Committee on
Claims * * * * *

TUESDAY, *March* 31, 1840.

* * * * *

Mr. Hubbard, from the Committee on Claims, to whom was referred the bill (H. R. 44) for the relief of Thomas Fillebrown, jr., reported it without amendment.

Mr. Hubbard also submitted a special report on the subject, which was ordered to be printed.

* * * * *

FRIDAY, *April* 24, 1840.

* * * * *

The Senate proceeded to consider, as in Committee of the Whole, the bill (H. R. 44) for the relief of Thomas Fillebrown, jr.; and

On motion by Mr. Hubbard,
Ordered, That it lie on the table.

* * * * *

MONDAY, *April* 27, 1840.

* * * * *

The Senate resumed, as in Committee of the Whole, the bill (H. R. 44) for the relief of Thomas Fillebrown, jr.

On motion by Mr. Hubbard,
That the further consideration thereof be postponed indefinitely ;
It was determined in the affirmative—Yeas 23, nays 11.

* * * * *

So it was

Resolved, That this bill be postponed indefinitely.

Ordered, That the Secretary notify the House of Representatives accordingly.

* * * * *

2d Session 27th Congress.

TUESDAY, *December 14, 1841.*

* * * * *

Mr. Evans presented the memorial of Thomas Fillebrown, jr., praying the payment of a balance ascertained to be due to him, as agent for the disbursement of the naval hospital fund, by a judgment in his favor, in a suit instituted against him by the United States; which was referred to the Committee on Claims.

* * * * *

TUESDAY, *February 8, 1842.*

* * * * *

Mr. Phelps, from the Committee on Claims, to whom was referred the memorial of Thomas Fillebrown, jr., submitted a report, accompanied by a bill (S. 158) for his relief.

The bill was read, and passed to the second reading.

Ordered, That the report be printed.

* * * * *

WEDNESDAY, *June 8, 1842.*

* * * * *

The Senate proceeded to consider, as in Committee of the Whole, the bill (S. 158) for the relief of Thomas Fillebrown, jr.; and

On motion by Mr. Phelps,

Ordered, That it lie on the table.

* * * * *

3d Session 27th Congress.

THURSDAY, *December 15, 1842.*

* * * * *

On motion by Mr. Evans,

Ordered, That the petition of Thomas Fillebrown, jr., on the files of the Senate, be referred to the Committee on Claims.

* * * * *

WEDNESDAY, *December 21, 1842.*

* * * * *

Mr. Phelps, from the Committee on Claims, to whom was referred the petition of Thomas Fillebrown, jr., submitted a report, accompanied by a bill (S. 37) for his relief; which was read, and passed to a second reading.

* * * * *

WEDNESDAY, *December 28, 1842.*

* * * * *

The bill (S. 37) for the relief of Thomas Fillebrown was read the second time, and considered as in Committee of the Whole.

On motion by Mr. Phelps,
Ordered, That it lie on the table.

* * * * *

1st Session 28th Congress.

MONDAY, *December* 11, 1843.

* * * * *

On motion by Mr. Evans,
Ordered, That the petition of Thomas Fillebrown, jr., on the files
 of the Senate, be referred to the Committee on Claims.

* * * * *

THURSDAY, *March* 21, 1844.

* * * * *

Mr. Haywood, from the Committee on Claims, to whom was referred
 the memorial of Thomas Fillebrown, submitted an adverse report ;
 which was ordered to be printed.

* * * * *

MONDAY, *April* 15, 1844.

* * * * *

The Senate proceeded to consider the report of the Committee on
 Claims on the petition of Thomas Fillebrown, jr. ; and,

On motion by Mr. Evans,
Ordered, That it lie on the table.

* * * * *

2d Session 30th Congress.

WEDNESDAY, *December* 6, 1848.

* * * * *

On motion by Mr. Phelps,
Ordered, That Thomas Fillebrown have leave to withdraw his pe-
 tition and papers.

* * * * *

FRIDAY, *December* 22, 1848.

* * * * *

On motion by Mr. Phelps,
Ordered, That the petition of Thomas Fillebrown, on the files of
 the Senate, be referred to the Committee on the Judiciary.

* * * * *

A No. 2.

Extracts from the Journals of the House of Representatives.

1st Session 23d Congress.

MONDAY, April 7, 1834.

* * * * *

A message from the Senate, by Mr. Lowrie, their Secretary:

Mr. Speaker: The Senate have passed bills of the following titles, to wit:

* * * * *

No. 47. An act for the relief of Thomas Fillebrown, jr.

* * * * *

WEDNESDAY, April 9, 1834.

* * * * *

Bills from the Senate of the following titles, viz:

* * * * *

No. 47. An act for the relief of Thomas Fillebrown, jr.

* * * * *

were severally read the first and second time, and referred.

* * * * *

No. 47. To the Committee of Claims.

* * * * *

WEDNESDAY, April 30, 1834.

* * * * *

Mr. Grennell, from the Committee of Claims, to whom was referred the bill from the Senate (No. 47) entitled "An act for the relief of Thomas Fillebrown, junior," reported the same without amendment.

Ordered, That the said bill be committed to a Committee of the Whole House to-morrow.

* * * * *

SATURDAY, June 28, 1834.

* * * * *

The House resolved itself into a Committee of the Whole House on bills from the Senate, and after some time spent therein, the Speaker resumed the chair, and Mr. John Y. Mason reported the said bills, as follows:

* * * * *

No. 47. An act for the relief of Thomas Fillebrown, junior, without amendment.

* * * * *

The bill from the Senate (No. 47) entitled "An act for the relief of Thomas Fillebrown, junior," was read the third time.

And after debate on the said bill,

The previous question was moved by Mr. Mann, of New York, and was demanded by a majority of the members present.

The said previous question was put, viz: Shall the main question be now put?

And passed in the affirmative.

The main question was then put, viz: Shall the bill pass?

And passed in the affirmative.

* * * * *

NOTE.—This bill is entered on the Journal as having passed the House of Representatives. It is an error; the bill was *rejected*.

1st Session 24th Congress.

WEDNESDAY, *December* 16, 1835.

* * * * *

Mr. Evans presented a memorial of Thomas Fillebrown, jr., of the city of Washington, praying for the passage of an act granting to him the amount of a certain judgment rendered in his favor for services as clerk in the Navy Department, together with costs of suit and interest upon the said judgment.

* * * * *

Ordered, That the said petitions and memorials be referred to the Committee of Claims.

* * * * *

2d Session 24th Congress.

MONDAY, *December* 12, 1836.

* * * * *

The undermentioned petitions and memorials, heretofore presented, were again presented and referred to the Committee of Claims, viz:

By Mr. Evans: The memorial of Thomas Fillebrown, jr., presented December 16, 1835.

* * * * *

THURSDAY, *March* 2, 1837.

* * * * *

Mr. Grennell, from the Committee of Claims, made a report on the petition of Thomas Fillebrown, accompanied by a bill (No. 968) for his relief; which bill was read the first and second time, and committed to a Committee of the Whole House to day.

* * * * *

2d Session 25th Congress.

MONDAY, *December* 11, 1837.

* * * * *

On motion, it was

Ordered, That the several memorials and petitions presented to the House of Representatives at the last Congress, and upon which favorable reports were made, and on which the House did not finally act,

be again referred to the committees to which said memorials and petitions were heretofore severally referred.

Under this order, the petitions of the under-mentioned persons were referred to the Committee of Claims, viz :

*	*	*	*	*	*	*	*
Thomas Fillebrown, jr.							
*	*	*	*	*	*	*	*

THURSDAY, *December* 14, 1837.

*	*	*	*	*	*	*	*
Mr. Whittlesey, of Ohio, from the Committee of Claims, reported sundry bills, to wit :							

*	*	*	*	*	*	*	*
No. 81. A bill for the relief of Thomas Fillebrown, jr.							
*	*	*	*	*	*	*	*

Which several bills, commencing with No. 15 and ending with No. 88, were read the first and second time, and were severally committed to a Committee of the Whole House to morrow.

*	*	*	*	*	*	*	*
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FRIDAY, *January* 12, 1838.

*	*	*	*	*	*	*	*
The House again resolved itself into a Committee of the Whole House on sundry bills, viz :							

*	*	*	*	*	*	*	*
and after some time spent in Committee of the Whole House, the Speaker resumed the chair, and Mr. Calhoun, of Massachusetts, reported that the committee had made some progress on bills No. 81 and 91, and directed him to ask leave to sit again thereon							
*	*	*	*	*	*	*	*

Ordered, That the Committee of the Whole House have leave to sit again on bills No. 81 and 91.

*	*	*	*	*	*	*	*
---	---	---	---	---	---	---	---

SATURDAY, *March* 31, 1838.

*	*	*	*	*	*	*	*
The House resolved itself into the Committee of the Whole House on sundry bills, viz :							

*	*	*	*	*	*	*	*
No. 81. A bill for the relief of Thomas Fillebrown, jr.							
*	*	*	*	*	*	*	*

And after some time spent in committee, the Speaker resumed the chair, and Mr. Lyon reported bill No. 81 without amendment,

*	*	*	*	*	*	*	*
<i>Ordered</i> , that bill No. 81, for the relief of Thomas Fillebrown, jr., be engrossed, and read a third time on Monday next.							

3d Session 25th Congress.

FRIDAY, *December 21, 1838.*

* * * * *

Mr. Chambers, from the Committee of Claims, reported several bills, viz :

* * * * *

No. 900. A bill for the relief of Thomas Fillebrown, jr., accompanied by a report in writing in each case ; which bills were severally read the first and second time and committed to a Committee of the Whole House to-morrow.

* * * * *

FRIDAY, *February 1, 1839.*

* * * * *

The House resolved itself into a Committee of the Whole House on sundry bills, viz :

* * * * *

No. 900. A bill for the relief of Thomas Fillebrown.

* * * * *

And after some time spent in Committee of the Whole House, the Speaker resumed the chair, and Mr. Lincoln reported as follows :

That on Nos. * * * 900 * * * the Committee had made progress, and directed him to ask leave to sit again thereon.

* * * * *

Ordered, That the Committee of the Whole House have leave to sit again on the bills on which progress has been reported.

* * * * *

1st Session 26th Congress.

SATURDAY, *January 4, 1840.*

* * * * *

Under the general order of this day, the petitions and papers of the under-mentioned persons were referred to the Committee of Claims, viz :

* * * * *

Thomas Fillebrown, jr.

* * * * *

SATURDAY, *February 29, 1840.*

* * * * *

Mr. Giddings, from the Committee of Claims, reported sundry bills, viz :

No. 44. A bill for the relief of Thomas Fillebrown, jr.

* * * * *

accompanied by a report in each case ; which bills were severally read the first and second times, and committed to a Committee of the Whole House to-morrow.

* * * * *

FRIDAY, *March 13, 1840.*

* * * * *

The House resolved itself into a Committee of the Whole House on sundry bills, viz :

* * * * *

No. 44. A bill for the relief of Thomas Fillebrown; and, after some time spent in Committee of the Whole House, the Speaker resumed the chair, and Mr. Davee reported that the committee had, according to order, had the said bill under consideration, and finding itself without a quorum had risen, and directed him to report that fact to the House.

* * * * *

FRIDAY, *March 20, 1840.*

* * * * *

The House resolved itself into a Committee of the Whole House on sundry bills, viz :

* * * * *

No. 44. A bill for the relief of Thomas Fillebrown.

* * * * *

And after some time spent in Committee of the Whole House, the Speaker resumed the chair, and Mr. Davee reported as follows :

* * * * *

That Nos. * * * 44 * * * he was directed to report to the House without amendment.

* * * * *

SATURDAY, *March 21, 1840.*

* * * * *

The House proceeded to the consideration of the bill (No. 44) for the relief of Thomas Fillebrown, junior, and the question was put that the bill be engrossed and read a third time.

And it passed in the affirmative—Yeas 80; nays 62.

* * * * *

Ordered, That the bill be read a third time to-day.

* * * * *

SATURDAY, *March 28, 1840.*

* * * * *

An engrossed bill (No. 44) entitled "An act for the relief of Thomas Fillebrown, junior," was read the third time.

And, after debate, the previous question was moved by Mr. A. Smith, was demanded by a majority of the members, and put, viz: Shall the main question be now put?

And it passed in the affirmative.

The main question was then put, viz: Shall the bill pass?

And passed in the affirmative—Yeas 74; nays 63.

* * * * *

Ordered, That the Clerk request the concurrence of the Senate in the said bill.

* * * * *

WEDNESDAY, *April* 29, 1840.

* * * * *

A message from the Senate, by Mr. Dickins, their Secretary :

Mr. Speaker : * * * * *

* * * * *

The Senate have *postponed indefinitely* bills of this House of the following titles :

* * * * *

No. 44. An act for the relief of Thomas Fillebrown.

* * * * *

OFFICE HOUSE OF REPRESENTATIVES U. S.,
November 19, 1855.

I hereby certify that the foregoing nine pages contain true extracts from the Journals of the House of Representatives relative to the petition of Thomas Fillebrown, junior.

Attest :

W. V. McKEAN,
Chief Clerk, Office House of Representatives U. S.

Your petitioner submits whether it is possible, or would be rational and just, that the government should now claim to reinvestigate his claim in its legislative department, after he having once applied to it for that purpose, and it refusing to do so, forced him to contest and try his claim in its judicial forums ; and after he had there succeeded, still further prosecuted his cause before the Supreme Court, where and when the judgment in his favor was affirmed.

He submits whether the government can claim the moral, legal, or constitutional right to subject him to the expense, burden, and delay of an action at law, of its own institution, which it prosecuted to a final appeal, thus depriving him of his just rights, and now, or at any time since the rendition of that verdict, require him to reprove his claim, in order and for no other reason than to comply with its assumed technical sovereignty, when he had once duly presented his claim for the action of the legislative department, which, as before stated, it declined to take charge of.

He submits, also, whether it is, or ever was, competent for Congress, as a legislative body, to review or reconsider the verdict of a jury, which is a question solely of judicial and not legislative cognizance ; and pleads in this behalf the 7th article of the amendment to the Constitution as absolutely prohibiting the same, and denies that either Congress or this Court, "sitting as a court of the United States," can, either in a legislative or judicial capacity, review the verdict of a sworn jury, or any facts tried by the same.

He claims that he is entitled to interest on the verdict from the date of its rendition, as a sum then liquidated and ascertained to be due in the most solemn and authentic manner known to our laws, which the government had no just grounds to refuse to pay ; but having, by its arbitrary and unjust procedure, deprived him of the use of his means, he claims that interest is justly, legally, and morally due, and should be paid just as much as the principal sum.

He therefore prays for a decree or award for the full amount of the principal sum of \$430, and interest from date of the verdict, on the 26th day of May, 1831, and for all just and equitable relief.

THOMAS FILLEBROWN.

Sworn to and subscribed before me, this first day of March, 1856.

HY. L. HARVEY,
Justice of the Peace, Washington County, D. C.

DISTRICT OF COLUMBIA, *scd.*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the first Monday of May, being the second Monday of the same month, in the year of our Lord one thousand eight hundred and thirty-one, and of the independence of the United States the fifty-fifth:

Present: William Cranch, chief judge; the Hon. Buckner Thruston and James S. Morsell, assistant judges; Henry Ashton, esq., marshal, and William Brent, clerk.

In the record of proceedings of the same court, among others, are the following, to wit:

THE UNITED STATES OF AMERICA }
 against
THOMAS FILLEBROWN, jr. }

Be it remembered that heretofore, to wit, on the twenty-third day of May, in the year of our Lord one thousand eight hundred and twenty-nine, the said United States of America, by Thomas Swann, esq., their attorney, prosecuted and sued forth out of the circuit court here the United States writ of *capias ad respondendum*, directed to the marshal of the District of Columbia, in the words and of the tenor following, to wit:

“DISTRICT OF COLUMBIA, *to wit*:

“*The United States of America to the marshal of the District of Columbia, greeting*:

“We command you that you take Thomas Fillebrown, jr., late of Washington county, if he shall be found within the county of Washington, in your said district, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the first Monday of December next, to answer unto the United States of America in a plea of trespass on the case, and so forth.

“Hereof fail not at your peril, and have you then and there this writ.

“Witness, W. Cranch, esq., chief judge of our said court, at the city of Washington, the 22d day of May, anno Domini one thousand eight hundred and twenty-nine.

“Issued the 23d May, 1829.

“W. BRENT, *Clerk.*”

SWANN.

And the said United States, by their attorney aforesaid, on the day of prosecuting and suing forth of the aforesaid writ, declared against the said Thomas Fillebrown, jr., in the plea aforesaid, in form following, to wit:

“DISTRICT OF COLUMBIA, }
Washington county, } *to wit:*

“Thomas Fillebrown, jr., late of Washington county, gentleman, was attached to answer unto the United States of America, in a plea of trespass on the case, and so forth. And whereupon the said United States, by Thomas Swann, their attorney, complain, that whereas the said defendant, on the first day of January, in the year of our Lord one thousand eight hundred and twenty nine, at the county aforesaid, was indebted unto the said plaintiffs in the sum of two thousand and seven dollars and eighty-four cents, current money, for sundry matters and articles properly chargeable in an account, as by a particular account thereof herewith into court exhibited appears; and being so indebted the said defendant in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and faithfully promised to the said plaintiffs to pay them the aforesaid sum of money when he should be thereto afterwards required.

“And whereas the said defendant afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, was indebted unto the said plaintiffs in another sum of two thousand and seven dollars and eighty-four cents, like money, for divers goods, wares, and merchandises, by the said plaintiffs, before that time, sold and delivered to the said defendant, and at his special instance and request; and being so indebted the said defendant in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, undertook and promised to the said plaintiffs to pay them the last aforesaid sum of money when he should be afterwards thereto required.

“And whereas afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, in consideration that the said plaintiffs, at the like instance and request of him the said defendant, had, before that time, sold and delivered to the said defendant, divers other goods, wares, and merchandises, the said defendant undertook and promised to the said plaintiffs to pay them so much money as they therefor reasonably deserved to have when he the said defendant should be thereunto afterwards requested; and the said plaintiffs in fact aver, that they therefor reasonably deserved to have of the said defendant, another sum of two thousand and seven dollars and eighty-four cents, like money, whereof the said defendant afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, had notice.

“And whereas the said defendant afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, was indebted unto the said plaintiffs in another sum of two thousand and seven dollars and eighty-four cents, like money, for the like sum of money by the said plaintiffs, and for the use of the said defendant, before that time paid, laid out, and expended, at the special instance and request of the said defendant, and for other money by the said plaintiffs before that time

lent and advanced to the said defendant at his special instance and request; and for other money by the said defendant before that time had and received to the use of the said plaintiffs; and being so indebted the said defendant in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiffs to pay them the said last mentioned sum of money, when afterwards he should be thereunto required.

“And whereas the said defendant afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiffs, and then being in arrear and unpaid; and upon that account the said defendant was then and there found in arrear and indebted to the said plaintiffs in a large sum of money, to wit, in the further sum of two thousand and seven dollars and eighty-four cents, like money; and so being found in arrear and indebted to said plaintiffs, the said defendant in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and promised to the said plaintiffs to pay them the said last mentioned sum of money when he should be thereunto afterwards required.

“Yet the said defendant not regarding his said several promises and undertakings so by him made in this behalf as aforesaid, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiffs in this respect, hath not yet paid the said several sums of money or any part thereof to the said plaintiffs, (although so to do the said defendant was requested by the said plaintiffs on the same day and year aforesaid, and often afterwards at the county aforesaid,) but he to do this hath hitherto refused and still refuses: wherefore the said plaintiffs say they are injured and have sustained damage to the value of five thousand dollars current money, and therefore they bring suit, &c.

“SWANN, *for the plaintiffs.*

“Pledges, &c.—JOHN DOE and RICHARD ROE.”

A copy of which said declaration was made and sent with the writ to the marshal of the district aforesaid, thereon endorsed, “to be served on the defendant with the writ.”

At which mentioned first Monday of December, in the year of our Lord one thousand eight hundred and twenty-nine, being the day of the return of the foregoing writ, come into the circuit court here, the said United States of America by their attorney aforesaid; and the marshal of the district aforesaid to whom the said foregoing writ was in form aforesaid directed, makes return thereof to the court here, thus endorsed, to wit: “*cepi*, T. Ringgold, marshal;” and the said Thos. Fillebrown, jr., being called, appears in court here by Richard S. Coxe and Walter Jones, esqrs., his attorneys; and thereupon, on motion of the said United States by their attorney aforesaid, it is ruled by the court here that the said Thomas Fillebrown, jr., give special bail in the plea aforesaid, or in default thereof be committed to the custody of the marshal of the district aforesaid; whereupon a certain Thomas Sewall

and Harvey Lindsley, present here in court in their own proper person, and (with the consent of the said United States by their attorney aforesaid,) undertake for the said Thomas Fillebrown, jr., that, in case the said United States shall recover judgment against the said Thomas Fillebrown, jr., in the plea aforesaid, or that the said Thomas Fillebrown, jr., shall be therein legally convict, that then the said Thomas Fillebrown, jr., shall pay the condemnation of the court thereupon, or render his body to the custody of the marshal of the district aforesaid in satisfaction thereof, or that they, the said Thomas Sewall and Harvey Lindsley, will do the same for him; and thereupon, on motion of the said United States by their attorney aforesaid, it is ruled by the court here that the said Thomas Fillebrown, jr., answer to the declaration aforesaid of the said United States in the plea aforesaid, or judgment by the court here will be entered against him in default thereof; and the said Thomas Fillebrown, jr., by his attorneys aforesaid, defends the force and injury, when, and so forth, and prays leave of the court here to imparle until the first Monday of May next, and then to answer to the declaration aforesaid of the said United States in the plea aforesaid, and to him it is granted: the same day is given to the United States also.

At which said first Monday of May, in the year of our Lord one thousand eight hundred and thirty, to which said day the said Thomas Fillebrown, jr., had leave to imparle, and then to answer to the declaration aforesaid of the said United States in the plea aforesaid, came again into the circuit court here, as well the said United States by their attorney aforesaid, as the said Thomas Fillebrown, jr., by his attorneys aforesaid; and the said Thomas Fillebrown, jr., by his attorneys aforesaid, as before defends the force and injury, when, and so forth, and saith that he did not assume upon himself in manner and form as the said United States above against him have complained, and of this he puts himself upon the country, and the said United States in like manner, and so forth; therefore let a jury thereon appear before the court here immediately, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c.; whereupon for trying the issue aforesaid, it is ordered by the court here that twelve persons from the panel of petit jurors returned to the court here by the marshal of the district aforesaid, be drawn by ballot, according to the law in such case made and provided; and thereupon the twelve persons so drawn being called, came, who, being empanelled, and sworn to say the truth in the premises, upon their oath do say that the said Thomas Fillebrown, jr., did assume upon himself in manner and form as the said United States within against him have complained, and they assess the damages of the said United States, sustained by occasion of the non-performance of the promise and assumption aforesaid, to the sum of nineteen hundred and thirty-seven dollars and seventy cents, current money: whereupon the said United States by their attorney, pray judgment against the said Thomas Fillebrown, jr., of and upon the verdict aforesaid, by the jurors aforesaid, in form aforesaid given; and the said Thomas Fillebrown, jr., by his attorneys aforesaid, saith that the court here ought not to proceed to render judgment upon the said verdict, and prays that judgment against him,

of and upon the said verdict, by the jurors aforesaid, in form aforesaid given, may be set aside, and that the issue aforesaid may be tried anew by other jurors, to be afresh empannelled ; and files in court here the following reasons, that is to say :

Reasons for new trial.

UNITED STATES
vs.
 THOMAS FILLEBROWN, jr. }

1. Because the verdict is against law.
2. Because it is contrary to the instruction of the court.
3. Because it is against evidence.
4. Because it is without evidence.
5. Because it is incongruous and inconsistent with itself.

JUNE 16, 1830.

R. S. COXE,
Attorney for defendant.

Whereupon all and singular the premises being seen, and by the court here fully understood, and mature deliberation being thereupon had, for that it appears to the court here that the verdict aforesaid be set aside and held entirely as void, and of no force or effect, and that the issue aforesaid be tried anew by other jurors, to be afresh empannelled ; therefore let a new jury thereon appear before the court here on the first Monday of December next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to said parties then and there, &c.

At which said first Monday of December, in the year of our Lord one thousand eight hundred and thirty, come again into the circuit court here, as well the said United States, by their attorney aforesaid, as the said Thomas Fillebrown, jr., by his attorneys aforesaid ; and thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here, thereon, is continued until the first Monday of May next.

And now at this day, to wit : the said first Monday of May, in the year of our Lord one thousand eight hundred and thirty-one, come again into the circuit court here, as well the said United States by their attorney aforesaid, as the said Thomas Fillebrown, jr., by his attorneys aforesaid ; and the said Thomas Fillebrown, jr., by his attorneys aforesaid, files in court here, the following deposition, to wit :

HUNTERDON COUNTY, }
State of New Jersey. }

The deposition of Samuel L. Southard, in the county and State aforesaid, a witness, produced, sworn, and examined on the part of the plaintiff, in a certain cause depending in the circuit court of the District of Columbia, for the county of Washington, wherein Thomas Fillebrown, jr., is plaintiff, and Duff Green is defendant.

And also the deposition of the said Samuel L. Southard, a witness

produced, sworn, and examined on the part of the defendant, in a certain cause depending in the circuit court of the District of Columbia, for the county of Washington, wherein the United States is plaintiff, and the said Thomas Fillebrown, jr., is defendant.

That is to say: From the year 1825, to the month of March, 1829, this deponent was Secretary of the Navy, and one of the commissioners of the Navy Hospital Fund; the other commissioners were the Secretary of the Treasury and the Secretary of War. The situation of the fund at the commencement of the period mentioned, and during the whole period, will be found in the reports made to the President and to Congress, and in letters to the Committee of Ways and Means in the House of Representatives, and of Finance in the Senate, by said commissioners and Secretary of the Navy. It required constant and earnest attention. Previous to that time separate books and records of its administration and management had not been kept, and the commissioners thought it necessary to provide them, and to appoint a secretary to discharge the duties usually performed by the secretaries of other funds. Thomas Fillebrown, jr., the plaintiff in the above mentioned cause against Duff Green, and the defendant in the above mentioned cause by the United States against said Fillebrown, was appointed by the board secretary, for the discharge of said duties, and his salary fixed at the sum of two hundred and fifty dollars per annum.

This deponent was, by the direction of the board, and by the previous practice and usage, acting commissioner of the fund, and attended to all matters connected with it, but, in every case where any new arrangements were to be made, money to be expended on a new object, or principle to be settled, he consulted with, and had the approval and authority of the whole board, and all his acts were considered as authorized and sanctioned by it.

The appointment and salary of Mr. Fillebrown had the direct and express sanction of the board, and it was understood that he was to discharge his duties at such times and in such manner as not to interfere with his duties as clerk in the Navy Department.

He acted as secretary during the remainder of the period above mentioned after his appointment, which was in October or November, 1825, but the records of the fund do not show the whole amount of labor which he had to perform; his duties were often both laborious and troublesome.

Sometime after his appointment, when it was considered proper to keep separate records and files of whatever related to this fund, he was directed to procure the necessary books, and make the necessary examinations into the records and files of the navy office and Fourth Auditor's office, and to do whatever was required to place the papers belonging to the fund in a proper condition. This was properly the duty of the secretary of the fund, but it related to a time previous to his appointment, and for which he could receive no compensation by his salary. It was therefore thought proper to allow him salary for such period previous to his actual appointment, as would be proportioned to the amount of labor actually performed by him, and such allowance was made about the month of May, 1826, and had the

approbation of the board. Deponent believes it was one hundred and twenty-five dollars, half a year's salary, but deponent refers to the files of the fund for the written authority given to him to receive the money. This allowance was regarded in the light of payment for extra service, and was given in this form to show the character of the service rendered by him.

Subsequent to the appointment of Mr. Fillebrown, and the fixing of his duties and salary, the commissioners were enabled by appropriations, and by collecting the moneys belonging to the fund from various sources, to proceed in the purchase of sites for hospitals and an asylum, and commence the erection of the buildings, as they were directed to do by the act establishing navy hospitals, passed February 26th, 1811. The fund was placed in the hands of the Treasurer of the United States as their treasurer; and, in collecting and disbursing it, it was found indispensable to have an agent who should attend carefully to it, and be responsible to the board. This did not belong to the duties of the secretary, Mr. Fillebrown, but it was thought best to give the agency to him, on account of his acquaintance with every part of the interests connected with the fund, and his fitness for the discharge of the duty. He was appointed the agent, with the understanding that he should receive a suitable compensation for the services he should render in that capacity. Deponent arranged with Mr. Fillebrown the principles, manner and forms of collecting and disbursing the moneys, and he prepared the drafts, warrants and letters for the signature of deponent when necessary; and in many, perhaps in most cases, had the responsibility of attending the payment and transmission of the moneys, and deponent believes that he did, at all times, act uprightly, diligently and skilfully in every thing relating to the subject. In so doing, it was the understanding of the commissioners that he should receive compensation, in the mode, and according to the practice of the government in other and similar cases, but deponent does not distinctly recollect whether it was to be by a specific sum, or by a percentage on the money disbursed, but is under the impression that it was the latter, that being the usual mode in such cases.

Deponent is under the impression that he did, by the authority of the board, allow one or more of the accounts presented by Mr. Fillebrown, in conformity with the facts and principles above detailed; and that such approval and allowance will be found on file in the office of the secretary of the fund. Deponent very well recollects, that, about the first of March, 1829, Mr. Fillebrown called on him with his accounts, desiring their adjustment and allowance; deponent was then very sick and not able to examine them, or consult the other commissioners; he, therefore, dictated to an amanuensis, a letter to Mr. Fillebrown, expressing his views and opinions respecting his claims, which letter is *probably* dated March 2d, 1829, and now on file among the papers of the fund; deponent then believed, and still believes, that Mr. Fillebrown was entitled to a just compensation for the performance of the duties before mentioned.

Deponent further states that he is acquainted with some of the facts connected with the payment of the sum of nine thousand dollars to

the Hon. Thomas Newton, on the 3d March, 1829, and which deponent has been informed was charged against the said Fillebrown. This sum was the price agreed by the commissioners of the navy hospital fund to be paid to Mr. Newton for land purchased of him near Norfolk, and on which the navy hospital has been erected. Great care had been taken to make the necessary examinations and select the best site for this hospital, and this land was believed to furnish the best that could be procured. An agreement was then made with Mr. Newton to give him a certain sum for a specified number of acres; according to deponent's recollection it was six thousand dollars for about fifteen or twenty acres. After this agreement, deponent and the Hon. James Barbour, one of the commissioners, went to Norfolk to fix on the location of the building and make the necessary arrangements with the architect and others for its erection. While there we became satisfied that the convenience, economy, and usefulness of the establishment would be promoted by purchasing the whole of the land owned by Mr. Newton at that point; we did so, and agreed to give him \$9,000 for the whole. The purchase was on the ground, in the presence of, and after consulting the architect and several other respectable and intelligent gentlemen who were present. Deponent believes that the first agreement was made with Mr. Newton in 1826, and the last early in the year 1827. The commissioners took possession of the land and proceeded in the erection of the building. The making of the deeds and the payment of the money were the subjects of several conversations between Mr. Newton and this deponent, and deponent preferred that Mr. Newton should wait for the payment until it could be made without inconvenience; and it was so agreed. At the commencement of the session, in December, 1828, Mr. Newton informed deponent that he had brought the deed for the land, and desired that the money should be paid before the end of the session, which was agreed to by deponent, as he expected an appropriation for the benefit of the fund. The appropriation was made of \$125,000 on the 2d March, 1829, and on the next day Mr. Newton called with his deed for the purpose of receiving the money; deponent was sick in bed, and desired Mr. Newton to take the deed to the office, have it examined, and the payment prepared there.

With the foregoing facts the first clerk in the department and Mr. Fillebrown, the secretary of the fund, were acquainted, and knew that the purchase had been made, and that the money was intended to be paid out of the before-mentioned appropriation. A short time after Mr. Newton went to the office, deponent received a note in pencil from the first clerk, stating, in substance, that the certified copy of the law had not been procured, and therefore that the money could not be drawn under it on that day, but that he could pay the money to Mr. Newton, and that a requisition could be subsequently signed. The note did not, as deponent recollects, state how the money was to be paid. As Mr. Newton was prepared to leave Washington, and deponent desired that he should be paid before deponent left the office, he returned for answer that the money should be paid; and in the name of Mr. Fillebrown, secretary of the fund, it was so done, and taken, as deponent was subsequently informed, from the pay of the

navy, to be replaced immediately by a requisition on the appropriation for the navy hospital fund. This requisition deponent would have signed if it had been presented to him before he resigned the office of Secretary of the Navy, and did not doubt that it would be signed by his successor in office, that being all that was necessary to place the matter in the situation required by law and the obligations which vested in the commissioners to complete their contract with Mr. Newton. In paying the money Mr. Fillebrown acted as agent of the commissioners, in completing the contract which they had made, and by which they had procured the land on which they were erecting a very large and costly building.

Deponent is not aware of any other facts necessary for him to state, and important to either of the parties in the above-mentioned causes; and in making the foregoing statements deponent has not been able to examine the papers and documents mentioned, to refresh his memory of dates and sums, but refers to them as the means of correcting his errors, if he have committed any. And further saith not.

SAM. L. SOUTHARD.

Examined, sworn, and subscribed, May 21, 1831, before

CHARLES EWING,

Chief Justice of the Supreme Court of New Jersey.

THOMAS FILLEBROWN, junior,	}	<i>In case.</i>
<i>vs.</i>		
DUFF GREEN.	}	<i>In case.</i>
THE UNITED STATES		
<i>vs.</i>		
THOMAS FILLEBROWN, junior.		

I, Charles Ewing, Chief Justice of the Supreme Court of the State of New Jersey, not being of counsel or attorney for either of the said parties, nor in any manner interested in the event of the said causes, or either of them, do hereby certify that the foregoing deposition of Samuel L. Southard, esq., was taken before me, at my house, in the city of Trenton, county of Hunterdon, and State of New Jersey, on the twenty-first day of May, in the year of our Lord one thousand eight hundred and thirty-one; that the said deposition was reduced to writing by the said deponent in my presence, at the said time and place, and so also subscribed by him, the said deponent being first by me carefully examined and cautioned, and sworn to testify the whole truth relative to the before mentioned causes, or matters in controversy. The said deposition was taken at the instance of the said Thomas Fillebrown, jr., the plaintiff in the one, and the defendant in the other of the said causes named in the caption or introduction hereof; and the reason for taking the same was that the residence of the said deponent, Samuel L. Southard, at Trenton aforesaid, is at a greater distance from Washington county, in the District of Columbia, the place of trial, than one hundred miles. Neither the adverse party nor his attorney, so far as I know, and as I verily believe, are within one hundred miles of this

place, and therefore they were not notified by me of the taking of this deposition, nor present at the taking thereof. And I further certify that the said deposition is by me sealed up, and directed to the said circuit court of the District of Columbia for the county of Washington. In testimony whereof I have hereunto set my hand and seal, the day and year in this behalf above written.

CHARLES EWING. [L. s.]

Whereupon, for trying anew the issue aforesaid, it is ordered by the court here that twenty persons, from the panel of petit jurors returned to the court here by the marshal of the District aforesaid, be drawn by ballot, according to the law in such case made and provided; and thereupon, the twenty persons being so drawn by ballot and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, came, to wit: Greenbury Gaither, Clement McWilliams, Thomas Marshall, Singleton Townshend, Jacob Janney, Henry McPherson, Thomas Fenwick, Henry G. Wilson, Edward N. Roach, Matthew Mitchell, Jesse Lipscomb, and William McCauley, who being empannelled, and sworn to say the truth in the premises, upon their oath do say that the said Thomas Fillebrown, jr. did not assume upon himself in manner and form as the said United States within against him have complained; therefore, it is considered by the court here that the said United States take nothing by their writ and declaration aforesaid, and that the said Thomas Fillebrown, jr. go thereof without day, &c.

And the jurors aforesaid, at the time of bringing in their verdict aforesaid, filed in court here the following certificate, to wit: "The jurors empannelled in the case of the United States *vs.* Thomas Fillebrown, jr. find, upon examining the accounts filed, that the United States are indebted to the said Fillebrown in the sum of four hundred and thirty dollars."

Witness our hands, this 26th day of May, 1831.

Greenbury Gaither,
Clement McWilliams,
Wm. M. McCauley,
Jacob Janney,
Thos. Fenwick,
Jesse Lipscomb,

Singleton Townshend,
Matthew Mitchell,
Ed. N. Roach,
Thos. Marshall,
H. G. Wilson,
Henry McPherson.

Memorandum.—Before the jurors aforesaid withdrew from the bar of the court here, the said United States, by their attorney aforesaid, filed in court here the following bills of exceptions, to wit:

THE UNITED STATES, }
vs. }
THOMAS FILLEBROWN, junior. }

Upon the trial of this cause, the plaintiffs gave in evidence to the jury the account hereunto annexed, &c., in these words and figures, to wit: (copied at page 28, &c.,) and read to the jury the certificate of

the officers of the government annexed to the said account. The plaintiffs then read in evidence to the jury the different warrants mentioned in the said account, with the receipts of the defendant upon the said warrants for the moneys therein mentioned; which said warrants, it is admitted, correspond with those charged in the said account.

The plaintiffs then read to the jury the following copies of entries from the books kept by the Board of Navy Hospital Commissioners, in these words, to wit: (copied at page 41, &c.)

The plaintiffs then gave evidence to the jury to prove that the defendant entered upon the performance of the duties mentioned in his said letter of appointment, and was the only person appointed by the said Navy Hospital Board to perform any of the duties of the said board, except as appears by the documentary evidence in this cause.

The plaintiffs gave evidence to prove that the defendant, at the time he was so appointed by the said Navy Hospital Commissioners, was a clerk in the Navy Department of the United States, upon a salary of \$1,000 per year, and continued to be a clerk in the said Navy Department for the whole time he performed the duties required of him by the said Board of Navy Hospital Commissioners.

The plaintiffs produced a book containing a record of the correspondence, &c., of the said Board of Commissioners the entries were in, from page 34 to page 131, inclusive, are admitted to be in the handwriting of defendant. (Which book is to be considered as annexed, and used in the appellate court, either the original or copy.) It is admitted, that besides the said book there are three others belonging to the office of said commissioners, which were also kept by the defendant during the time he acted as secretary to the board, to wit: a warrant book, journal, and ledger; all of which are to be considered in like manner annexed, &c., &c.

The plaintiffs further produced in evidence, two books from the office of the Treasurer of the United States, containing the account of the Treasurer with the Commissioners of the Navy Hospital Fund, to be in like manner considered as annexed, &c., &c.

The plaintiffs vested their case upon this evidence.

The defendant on his part produced evidence to prove that it was the general usage of the several departments of the government to allow to officers of the government, both civil and military, commissions upon pecuniary transactions, not within the sphere of their regular official duties, which commissions were allowed over and above the stated salary or other compensation to which such officers were entitled *ex officio*, and to support such usage, proved that the Navy Department had been for a long course of years in the habit of allowing the officers of the navy commanding squadrons or ships, a commission of two and a half per cent. for bills drawn by such officers on the Navy Department, in order to obtain supplies abroad for the use of such squadrons or ships; and also to allow such officers, when, from any emergency, acting as pursers, a like commission on their disbursements of public money, over and above their regular pay and emoluments *ex officio*, and the profits arising from the purser's business, so transacted by them; and also to allow such officers other extra compensation, in the form of a per diem allowance, when engaged in

extra service, as on surveys, courts martial, &c.; that it had also, for a long course of years been the habit and custom of the War Department to allow such commissions and other extra compensation for like services to the officers of the army, and of the topographical engineers; and the defendant further produced, and read in evidence the report of the Third Auditor, accompanying the letter of the Secretary of War, (January 2, 1827,) to the Speaker of the House of Representatives, printed among the documents of that House, of the 19th Congress, and 2d session, Doc. No. 41, which was admitted in evidence, and to be referred to, (extracts copied, beginning at page —;) and defendant, also, produced, and read in evidence the report of the Secretary of the Treasury to the House of Representatives, printed among the documents of that House of the 21st Congress, 1st session, Doc. No. 57, in like manner admitted, and to be referred to, (copied, beginning at page —;) and further proved that the Navy Department had, for thirty or forty years past, been in the habit of allowing one of the clerks of that department a commission of one per cent. over and above his regular salary as clerk, for the disbursement of the contingent fund of the department, and occasional disbursements of the fund appropriated for the pay of the navy; and that the accounting officers of the treasury, attached to the War and Navy Departments, were in the habit of passing and allowing such commissions and other extra compensation in the settlements of the accounts of the persons claiming the same, upon such allowance being signified on the account, by the head of the department putting the initials of his name to such allowance; and the defendant produced, and read in evidence to the jury, the following accounts, &c., from among the public documents of admitted accounts of disbursements of the said navy hospital fund, to wit: Account of George Harrison, navy agent, with the said commissioners, June 26, 1826; a receipt from the same, dated July, 14, 1826; account of W. S. Rodgers, purser in the navy, September 24, 1823, with a receipt dated August 16, 1826; approval of George Harrison's account by the commissioners, per letter, July 12, 1826; account of Silas Butler, purser of the navy, dated May 15, 1824; also, the two reconciling statements furnished by the Fourth Auditor to defendant, dated November 5, 1829, and November 24, 1829; and defendant's letter to said Fourth Auditor, dated November 5, 1829; all of which are admitted; (copied at page — to page —;) and the said defendant further proved, that in the first account rendered by him to the said commissioners, after his said appointment as secretary, he charged a commission of one per cent. on his disbursements of the navy hospital fund, of which the allowance is signified by the initials of S. L. Southard, then Secretary of the Navy, signed by himself; and his several accounts, as rendered to the said commissioners, are produced from the Treasury Department, and hereto annexed, (copied at page —;) also a letter from the said S. L. Southard, written on the 2d March, 1829, while he was such Secretary as aforesaid, (being the same letter recorded in said book, produced by plaintiffs as aforesaid, at page 130,) to the admission of which letter the plaintiffs object, any further than as the testimony of Mr. Southard to the matters

therein stated ; also the deposition of J. H. Eaton, present Secretary of War, which is admitted and hereto annexed. (Copied at page —.)

Memorandum.—The said book containing the record of Mr. Southard's said letter of the 2d March, 1829, was produced by plaintiffs after that letter had been given in evidence by defendant, as aforesaid.

And it was further proved that no account was opened at the treasury with the defendant on account of the receipts and disbursements of the said navy hospital fund, till the account was transmitted to be settled preparatory to this suit, and when the above account first produced by plaintiffs was stated in the form aforesaid ; and that defendant during all the time he acted as Secretary, as aforesaid, rendered his accounts to the said commissioners, in the form above given in evidence, and not to the Treasury Department.

The plaintiffs then gave to the jury this further evidence, viz : the evidence of George W. Dashiell, copied at page —.

And the defendant gave to the jury this further evidence, viz : the evidence of George Macdaniel, copied at page —.

Whereupon the plaintiffs prayed the opinion and instruction of the court to the jury as follows :

Upon the evidence so given the counsel for the United States prayed the court to instruct the jury—

That if, from the evidence aforesaid, it should appear to them that the defendant had accepted the appointment of secretary of the Board of Navy Hospital Commissioners upon the terms mentioned in the said appointment, and in the said letter of S. L. Southard to him of the 7th of November, 1825, as herein before stated, that in that case he was not entitled to any extra compensation for the disbursement of the moneys belonging to the said navy hospital fund, and that he was only entitled to \$250 a year for the whole of the services performed by him for the said board.

And the said plaintiffs prayed the court further to instruct the jury—

That if they should be satisfied, by the evidence aforesaid, that the said Board of Navy Commissioners had never passed any order or resolution for the payment of any commission upon the moneys disbursed by the defendant for the said board, and that the claim for commissions which he now makes had never been sanctioned or settled by the said board, that it is not competent for him now to set up the said claim for commissions against the claim of the United States, for which this suit is brought.

Which instructions the court refused ; and thereupon, at the instance of the defendant, instructed the jury as follows :

If the jury believe, from the evidence, that the regular duties to be performed by the defendant as secretary to the Commissioners of the Navy Hospital Fund, at the stated salary of \$250 per annum, did not extend to the receipt and disbursement of the fund ; that the duty of receiving and disbursing the fund was required of and performed by him as an extra service, over and above the regular duties of his said appointment ; that it has been for many years the general practice of the government and its several departments to allow to persons, though holding offices or clerkships for the proper duties of which they re-

ceived stated salaries or other fixed compensation, commissions over and above such salaries or other compensation, upon the receipts and disbursements of public moneys appropriated by law for particular services, when such receipts and disbursements were not among the ordinary and regular duties appertaining to such offices or clerkships, but superadded labor and responsibility apart from such ordinary and regular duties; and that defendant took upon himself the labor and responsibility of such receipts and expenditures of the navy hospital fund at the request of said commissioners, either under an agreement or with an understanding on both sides that he should be compensated for the same, as extra service, by the allowance of a commission on the amount of such receipts and disbursements; then it is competent for the jury in this case to allow such commissions to the defendant, on the said receipts and disbursements, as the jury may find to have been agreed upon between the said commissioners and defendant; or, in the absence of any specific agreement fixing the rate of such commissions, such rate as the jury shall find to be reasonable and conformable to the general usage of the government and its departments in the like cases.

To which refusal of the court to give the instructions moved by the plaintiffs, and to the said instructions given at the instance of the defendant, plaintiffs except, &c., and this their bill of exception is sealed, &c., this 26th of May, 1831.

W. CRANCH.

JAMES S. MORSELL. [SEAL.]

Dr. *Thomas Fillebrown, jr., secretary, in account with Commissioners of Navy Hospital.* Cr.

Date.	No. of warrant.	Amount.	Date.	To whom paid.	Amount.
1826.			1826.		
February 6	Warrant No. 1	\$77 50	February 6	J. & J. Williams	\$15 00
May 1	do 2	62 50	May 6	My services as secretary for the year ending this day	250 00
May 24	do 3	125 00		George Harrison	161 91
July 12	do 4	161 91	July 14	Davis & Force	18 50
August 10	do 5	198 50	August 24	William S. Rogers	180 00
October 24	do 6	1,000 00	Sept. 24	Pratt & Bricknell	1,000 00
November 13	do 7	100 00	October 31	George Harrison	100 00
November 30	do 8	3,300 00	Nov. 15	Thomas Harris	82 20
December 5	do 9	200 00	December 14		
December 29	do 10	130 00	1827.		
			January 6	Pratt & Bricknell	3,000 00
January 16	do 11	10,793 94	January 19	George Harrison	10,793 94
January 29	do 12	1,450 00	January 29	John Haviland	300 00
January 30	do 13	300 00	March 2	John Haviland	10,000 00
February 28	do 14	10,000 00	March 14	William Strickland	6,000 00
March 6	do 15	4,500 00	March 15	Tho. Harris	101 34
March 13	do 16	101 34	March 24	George Strickland	75 00
March 21	do 17	75 00	March 31	George Harrison	2,200 00
March 29	do 18	1,200 00	April 4	John Haviland	10,000 00
April 30	do 19	10,000 00	May 6	My salary for year	250 00
May 1	do 20	62 50	May 9	William Strickland	10,000 00
May 7	do 21	10,000 00	May 25	George Harrison	1,113 63
May 22	do 22	1,113 63	June 14	William Strickland	10,000 00
June 11	do 23	10,024 87	June 28	John Haviland	10,000 00
June 21	do 24	10,000 00	July 7	William Strickland	10,000 00
July 5	do 25	10,000 00	August 22	John Haviland	15,000 00
August 6	do 26	62 50	August 22	William Strickland	10,000 00
August 15	do 27	15,000 00	Sept. 20	William Strickland	10,000 00
August 20	do 28	10,000 00	October 6	John Haviland	10,000 00
September 17	do 29	10,000 00	Nov. 2	Tho. Harris	500 00
September 26	do 30	10,000 00	Nov. 17	Tho. Harris	100 00

October 31	do	31	562 50	1828.	February 29	John Haviland	1,200 00
November 15	do	32	300 00	March	20	William Strickland	5,000 00
1828.				April	15	William Strickland	4,405 94
January 3	do	33	200 00	May	6	My salary for the year	250 00
January 30	do	34	1,450 00	May	15	William Strickland	5,000 00
February 29	do	35	1,200 00	June	12	William Strickland	10,000 00
March 18	do	36	3,550 00	June	18	John Haviland	15,000 00
April 11	do	37	4,405 94	July	17	William Strickland	10,000 00
May 13	do	38	5,000 00	October	6	William Strickland	10,000 00
June 9	do	39	10,000 00	October	7	John Haviland	10,000 00
June 17	do	40	25,000 00	Nov.	17	John Haviland	5,000 00
October 3	do	41	20,175 00	December	4	J. Avnett	63 52
November 13	do	42	5,000 00	December	16	T. Harris	500 00
November 24	do	43	200 00	1829.			
December 4	do	44	63 52	February	10	T. Harris	1,000 00
December 11	do	45	500 00	February	6	My salary for 3 quarters	187 50
1829.							
February 10	do	46	1,100 00			Commission of 1 per cent. on amount disbursed	207,848 48
March 2	do	47	910 17				2,007 84
March 31	do	48	209,856 32	April	4	John Haviland	209,856 32
			20,000 00	April	14	William Strickland	10,000 00
			229,856 32				10,000 00
							229,856 32

Mr. Fillebrown, it appears, was appointed secretary on November 7, 1825. He can be entitled to pay as such only from the date of his appointment. The allowance of 1 per cent. on the moneys disbursed cannot be allowed unless authorized by some existing law. None such is known to the commissioners; of course they cannot have authority to admit it.

SEPTEMBER 7, 1829.

J. H. EATON.
J. BRANCH.

No. 226.

TREASURY DEPARTMENT,
Fourth Auditor's Office, September 10, 1829.

I certify that I have examined and adjusted the account of Thomas Fillebrown, jr., secretary of the navy hospital fund, and find that he is indebted to the United States in the sum of two thousand and sixty-three dollars and thirty-eight cents.

Navy Hospitals, \$2,063 38.

As appears from the statement and vouchers herewith transmitted for the decision of the Second Comptroller of the Treasury thereon.

T. H. GILLISS,
Acting Fourth Auditor.

ISAAC HILL, Esq.,
Second Comptroller of the Treasury.

SECOND COMPTROLLER'S OFFICE.

I admit and certify the above balance, this 11th day of September, 1829.

ISAAC HILL,
Second Comptroller.

*The Commissioners of Navy and Hospitals to Thomas Fillebrown, jr.,
their secretary, Dr.*

For my salary as secretary, from 7th February to 16th May, 1829, three months, ten days, at \$250 per annum	\$69 36
--	---------

For my commissions as disbursing officer on the following payments:

1829. March 3, To T. Newton, for land...	\$9,000 00
April 4, To J. Haviland, (advance)	10,000 00
April 14, To W. Strickland, (advance)	10,000 00

\$29,000, 1 pr. ct. 290 00

For short charge of commissions in account rendered 2d

March, 1829, viz:

On \$207,848 48, 1 per cent	2,078 48
-----------------------------------	----------

Deduct amount charged and received.....	2,007 84
---	----------

70 64

430 00

E. E. THOMAS FILLEBROWN, JR.

*Thomas Fillebrown, jr., secretary of the Commissioners of the Navy
Hospital Fund, to the United States, Dr.*

Navy Hospitals:

For balance due per report No. 226, dated 10th September, 1829	\$2,063 38
--	------------

Pay afloat:	
For requisition No. 2,388, issued in his favor March 3, 1829	\$9,000 00
	11,063 38
Navy hospitals.....	2,063 38
Pay afloat.....	9,000 00
	11,063 38

TREASURY DEPARTMENT,
Fourth Auditor's Office.

Stated by B. BUCKNER, Clerk.

Reconciling statement of the account of Thomas Fillebrown, jr., secretary to the commissioners of the navy hospital fund.

For this sum overcharged for salary per report No. 226,	\$125 68
1 per cent. commission disallowed per report No. 226.....	2,007 84
requisition No. 2,388, issued in his favor March 3, 1829	9,000 00
1 per cent. commission disallowed on \$29,000 in his last account.....	290 00
1 per cent. commission disallowed for short commission in his last account.....	70 64
	11,494 16
Deduct this sum due him per his last account herewith.....	\$430 00
Deduct short calculation in salary.....	78
	430 78
Balance due the United States per official statement.....	11,063 38

TREASURY DEPARTMENT,
Fourth Auditor's Office.

Stated by B. BUCKNER, Clerk.

No. 353.

TREASURY DEPARTMENT,
Fourth Auditor's Office, October 31, 1829.

I certify that I have examined and adjusted the accounts of Thomas Fillebrown, jr., secretary to the commissioners of the navy hospital

fund, and find that there is due from him to the United States the sum of eleven thousand and sixty-three dollars and thirty-eight cents.

Due the United States under navy hospitals.....	\$2,063 38
Pay afloat.....	9,000 00

11,063 38

As appears from the statement and vouchers herewith transmitted for the decision of the Second Comptroller of the Treasury thereon.

AMOS KENDALL, *Auditor.*

ISAAC HILL, Esq.,
Second Comptroller of the Treasury.

SECOND COMPTROLLER'S OFFICE.

I admit and certify the above balance, this 31st day of October, 1829.

ISAAC HILL,
Second Comptroller.

Thomas Fillebrown, jr., late Secretary to the Commissioners of the Navy Hospital Fund, in account with the United States.

DR. CR.

NAVY HOSPITALS.		NAVY HOSPITALS.	
To balance due, per report No. 353, dated October 31, 1859--	\$2,063 38	By balance due United States under this head -----	\$2,063 38
To balance due United States under this head-----	2,063 38		
PAY AFLOAT.		PAY AFLOAT.	
To balance, per report No. 353, dated October 31, 1829----	9,000 00	By Thomas Newton, Norfolk, Va., for this sum paid him per his receipt filed herewith -----	9,000 00

TREASURY DEPARTMENT, *Fourth Auditor's Office*

H. C. WILLIAMS, *Clerk.*

No. 399.

TREASURY DEPARTMENT,
Fourth Auditor's Office, November 16, 1829.

I certify that I have examined and adjusted the account of Thomas Fillebrown, jr., late secretary of the commissioners of the navy hospital fund, and find that there is due from him to the United States the sum of two thousand and sixty-three dollars and thirty-eight cents, under navy hospitals, as appears from the statement and vouchers herewith transmitted for the decision of the Second Comptroller of the treasury thereon.

AMOS KENDALL, *Auditor.*

ISAAC HILL., Esq.,
Second Comptroller of the Treasury.

SECOND COMPTROLLER'S OFFICE.

I admit and certify the above balance, this 16th day of November, 1829.

ISAAC HILL,
Second Comptroller.

TREASURY DEPARTMENT,
Fourth Auditor's Office, November 17, 1829.

Pursuant to "An act to provide for the prompt settlement of public accounts," approved March 3, 1817, I, Amos Kendall, Fourth Auditor of the Treasury of the United States, do hereby certify that the foregoing are true transcripts from the original report on file in this office.

AMOS KENDALL.

Be it remembered that Amos Kendall, esq., who certified the foregoing transcript, is now, and was at the time of doing so, Fourth Auditor of the Treasury of the United States, and that faith and credit are due to his official attestations.

In testimony whereof I, Samuel D. Ingham, Secretary of the Treasury of the United States, have hereunto subscribed my name, [L. s.] and caused to be affixed the seal of this department, at the city of Washington, this seventeenth day of November, in the year of our Lord one thousand eight hundred and twenty-nine.

S. D. INGHAM,
Secretary of the Treasury.

At a meeting of the commissioners of naval hospitals, in the city of Washington, on the 7th day of November, 1825:

Present, Hon. Samuel L. Southard, Secretary of the Navy; Hon. Richard Rush, Secretary of the Treasury; Hon. James Barbour, Secretary of War.

It was *Resolved*, That a secretary be appointed to this board to take charge of the books, papers, &c., belonging to the hospital fund, and

to execute such duties relative thereto as may be required of him by the board, for which services he shall be allowed the sum of two hundred and fifty dollars per annum.

Resolved, That Mr. Thomas Fillebrown, jr., be appointed secretary. And then the board adjourned.

NAVY DEPARTMENT, *November 7, 1825.*

SIR: You are hereby appointed secretary to the Board of Commissioners of the Naval Hospital Fund. The duties appertaining to this appointment you will commence forthwith. Your compensation will be two hundred and fifty dollars per annum.

I am, respectfully, &c.,

SAM'L L. SOUTHARD.

Mr. THOMAS FILLEBROWN, jr., *Present.*

NAVY DEPARTMENT, *May 22, 1826.*

SIR: In consideration of the duties performed by you since your appointment as secretary to the Commissioners of Navy Hospitals, you may consider your appointment as ante-dated six months, and draw a warrant for your salary for that period.

I am, respectfully, &c.,

S. L. S.

Mr. THOMAS FILLEBROWN, jr., *Present.*

The Commissioners of Naval Hospitals to George Harrison, Navy Agent, Dr.

For the purchase money and expense of survey, &c., of a lot of ground bought of Mr. Timothy Abbott, by order of the Hon. Sam'l L. Southard, Secretary of the Navy, in letter dated 1st May, 1826, situate on the river Schuylkill, north of, and near to, the United States arsenal, as a site for a naval hospital, containing twenty-five acres two roods and twenty-three perches	\$16,000 00
The services of T. Mitchell, land broker, surveyings and writings, &c.....	191 00
	16,191 00
My commission on the above, at one per cent.....	161 91
	16,352 91

Errors excepted. Philadelphia, June 26, 1826.

WILLIAM REED,
For George Harrison.

Approved: S. L. S.

Philadelphia, July 14, 1826. Received from Thomas Fillebrown, jr., esq., secretary of the Commissioners of Naval Hospitals, one hun-

dred and sixty-one dollars and ninety-one cents, in full for balance due as per account stated, (\$161 91.) GEO. HARRISON.

The deeds shall be forwarded as soon as recorded, with the district attorney's certificate as to said title.

Commissioners of Navy Hospitals to Wm. S. Rodgers, Dr.

For brokerage on the purchase of real estate in Chelsea,
intended as a site for a naval hospital, one per cent. on
\$18,000 \$180 00

Boston, *September 24, 1823.*

Boston, August 16, 1826. Received payment for the above of Thos.
Fillebrown, jr. WM. S. RODGERS.

Allowed: S. L. S.

NAVY DEPARTMENT, *July 12, 1826.*

SIR: Your letter of the 26th ultimo, with your account, &c., for purchase for the Commissioners of Navy Hospitals, has been received. The account is approved by the commissioners, and I now remit you my check for the sum of one hundred and sixty-one dollars and ninety-one cents, (\$161 91,) being the amount charged for commission. Be pleased to send me your receipt for this amount when realized, under cover to the honorable Secretary of the Navy.

When the deed shall be recorded, I will thank you to transmit the same to the commissioners.

I am, very respectfully, &c. T. F., JR., *Secretary, &c.*
GEORGE HARRISON, Esq.,
Navy Agent, Philadelphia.

OFFICE OF DISCOUNT AND DEPOSIT,
Washington, D. C., July 12, 1826.

Pay to George Harrison, esq., or order, the sum of one hundred and sixty-one dollars and ninety-one cents, (\$161 91.)

T. F., JR.

NAVY DEPARTMENT, *November 25, 1829.*

I, John Boyle, do hereby certify that the preceding copy of a letter is correctly transcribed from a record book now kept in this department.

JOHN BOYLE.

Be it remembered, that John Boyle, who certified the preceding, is now, and he was at the time of doing so, a clerk of this department; and that faith and credit are due to his official attestations.

In testimony of which I, John Branch, Secretary of the Navy of the United States, have hereunto subscribed my name, and caused to be affixed the seal of the Navy Department, at the
[L. S.] city of Washington, this 25th day of November, in the year of our Lord 1829, and of the independence of the United States the fifty-fourth.

JNO. BRANCH.

NAVY DEPARTMENT, *November 25, 1829.*

I, John Boyle, do hereby certify that the within transcript is a true copy of an original account, on file in this department.

JOHN BOYLE.

Be it remembered, that John Boyle, who certified the preceding transcript, is now, and he was at the time of doing so, a clerk of this department, and that faith and credit are due to his official attestations.

In testimony of which I, John Branch, Secretary of the Navy of the United States, have hereunto subscribed my name, and caused to be affixed the seal of this department, at the city of Washington, this 25th day of November, in the year of our Lord 1829, and of the Independence of the United States the fifty-fourth.

JNO. BRANCH.

Reconciling statement of the account of Thomas Fillebrown, jr., Secretary of the Commissioners of the Navy Hospital Fund, reported September 10, 1829.

To overcharge of salary, from May 6 to November 7, 1825, 6 months 1 day, at \$250 per annum.....	\$125 68
To commission of 1 per cent. disallowed.....	2,007 84
	2,133 52
Deduct pay from February 6, 1829, (time charged to in his account,) to the 16th May, 1829, not charged, 3 months 11 days	70 14
Balance due the United States per official statement.....	2,063 38

TREASURY DEPARTMENT,

Fourth Auditor's Office, November 5, 1829.

AMOS KENDALL.

Reconciling statement of the account of Thomas Fillebrown, jr., Secretary to the Commissioners of the Navy Hospital Fund, reported October 31, 1829.

For this sum overcharged for salary, per report No. 226	\$125 68
For 1 per cent. commission disallowed, per report No. 226	2,007 84
For requisition No. 2,388, issued in his favor, March 3, 1829	9,000 00
For 1 per cent. commission disallowed on \$29,000, in his last account.....	290 00
For 1 per cent. commission disallowed, for short com- mission on ditto.....	70 64
	11,494 16

Deduct this sum, due him per his last account, herewith.....	\$430 00	
Deduct short calculation in salary.....	78	
		430 78
Balance due the United States per office statement.....		<u>\$11,063 38</u>

TREASURY DEPARTMENT,

Fourth Auditor's Office, November 5, 1829.

AMOS KENDALL.

WASHINGTON, D. C., *November 5, 1829.*

SIR : I have received your letter of this date, enclosing a reconciling statement of my accounts, as settled in your office. By this document, I find that the item of \$9,000 is exhibited as a charge against me, notwithstanding the receipt for that sum is on the margin of the deed of the land for which the money was paid. These, together with the order on which I made the payment, were left by me in the Navy Department.

It is but just that I should be credited with the payment made to Mr. Newton, or have the valuable property in my own right, I cannot suppose that the Secretary of the Navy, in his wisdom, anticipates this alternative, as I am advised that he has been expending large sums of money on the premises, and since he was fully apprised of the situation of the property. Neither can I suppose that it is the purpose of the officers of the government to delay a just settlement of my accounts, with a view to countenance the slanders of my enemies. If I am to be further delayed and embarrassed, I have to request that a suit be commenced immediately.

I am advised that sundry documents in your office will be of service to me in the prosecution of my claim before the Board of Commissioners of Navy Hospitals, for commissions on my disbursements ; and I have the honor, therefore, to request that you will be pleased to direct me to be furnished with copies of them accordingly. They are—

1st. The voucher for my payment to George Harrison, of \$161 91, and which is numbered 2.

2d. The voucher for my payment to Wm. S. Rogers, of \$180, and which is numbered 4.

3d. So much of Purser Butler's account, for the purchase of land near the navy yard, Brooklyn, N. Y., (on account of said commissioners,) as will show the rate and amount allowed him as commission on the purchase.

I am, respectfully, &c.,

THOMAS FILLEBROWN, JR.

AMOS KENDALL, Esq.,

Fourth Auditor of the Treasury.

The Commissioners of Navy Hospitals in account with Thomas Fillebrown, jr., their secretary.

DR.

CR.

1826.	Voucher.	1826.	By warrant No. 1	
February	Cash paid J. & J. Williams	Feb. 6	-----	\$77 50
July	Cash paid George Harrison	May 1	-----	62 50
August	Cash paid Davis & Force	May 24	-----	125 00
August	Cash paid W. S. Rogers	July 12	-----	161 91
October	Cash paid Pratt & Bicknell	Aug. 10	-----	198 50
		Oct. 24	-----	1,000 00
	To my services as secretary to the board from May 7, 1825, to November 6, 1826, inclusive, one year and six months, at \$250 per annum			
				375 00
	Commission of one per cent. on \$1,375 41			1,750 41
				138 75
	To balance due T. F., jr., and carried to new account			1,764 16
				138 75
			Balance	1,625 41
				138 75
				1,764 16

E. E.

TH. FILLEBROWN, JR.

NOVEMBER 7, 1826.

Approved November 13, 1826.

S. L. S.

THOMAS FILLEBROWN.

Date.	No. of warrant.	Amount.	Date.	To whom paid.	Amount.
1826.			1826.	J. and J. Williams, No. 1.	\$15 00
February 6	Warrant No. 1	\$77 50	February —	Services as secretary for year ending this	
May 1	do 2	62 50	May 6	day	250 00
May 24	do 3	125 00		George Harrison, No. 2	161 91
July 12	do 4	161 91	July 14		18 50
August 10	do 5	198 50	August 24	Davis & Force, No. 3	180 00
October 24	do 6	1,000 00	Sept. 24	Wm. S. Rogers, No. 4	1,000 00
November 13	do 7	100 00	October 31	Pratt & Bricknell, No. 5	1,000 00
November 30	do 8	3,300 00	Nov. 15	George Harrison, No. 6	100 00
December 5	do 9	200 00	December 14	Thomas Harris, No. 7	82 20
December 29	do 10	130 00			
1827.			1827.		
January 16	do 11	10,793 94	January 6	Pratt & Bricknell, No. 8	3,000 00
January 29	do 12	1,450 00	January 19	George Harrison, No. 9	10,793 94
January 30	do 13	300 00	January 29	John Haviland, No. 10	300 00
February 28	do 14	10,000 00	March 2	John Haviland, No. 11	10,000 00
March 6	do 15	4,500 00	March 14	Wm. Strickland, No. 12	6,000 00
March 13	do 16	101 34	March 15	Thomas Harris, No. 13	101 43
March 21	do 17	75 00	March 24	Geo. Strickland, No. 14	75 00
March 29	do 18	1,200 00	March 31	Geo. Harrison, No. 15	1,200 00
April 30	do 19	10,000 00	May 4	John Haviland, No. 16	10,000 00
May 1	do 20	62 50	May 6	Salary for year	250 00
May 7	do 21	10,000 00	May 9	Wm. Strickland, No. 17	10,000 00
May 22	do 22	1,113 63	May 25	Geo. Harrison, No. 18	1,113 63
June 11	do 23	10,024 87	June 14	Wm. Strickland, No. 19	10,000 00
June 21	do 24	10,000 00	June 28	John Haviland, No. 20	10,000 00
July 5	do 25	10,000 00	July 7	Wm. Strickland, No. 21	10,000 00
August 6	do 26	62 50	August 22	John Haviland, No. 22	15,000 00
August 15	do 27	15,000 00	Sept. 20	Wm. Strickland, No. 23	10,000 00
August 20	do 28	10,000 00	October 6	Wm. Strickland, No. 24	10,000 00
September 17	do 29	10,000 00	Nov. 2	John Haviland, No. 25	10,000 00
September 26	do 30	10,000 00	Nov. 17	Thomas Harris, No. 26	500 00
				Thomas Harris, No. 27	100 00

[illegible]

SEPTEMBER 7, 1829.

Mr. Fillebrown, it appears, was appointed secreiary in November 7, 1825. He can be entitled to pay as such only from the date of his appointment. The allowance of one per cent. on the moneys disbursed cannot be allowed, unless authorized by some existing law; none such is known to the commissioners; of course they cannot have authority to admit it.

J. H. EATON,
JOHN BRANCH.

TREASURY DEPARTMENT,
Fourth Auditor's Office, May 22, 1830.

I certify the foregoing to be a correct transcript of the original on file, with report No. 226, dated September 10, 1829.

AMOS KENDALL.

*The Commissioners of Navy Hospitals to Thomas Fillebrown, jr.,
their secretary, Dr.*

For my salary as secretary, from February 7 to May 16,
1829, three months ten days, at \$250 per annum..... \$69 36

For my commission as disbursing officer on the follow-
ing payments:

1829, March 3. To T. Newton for land	\$9,000	
April 4. To J. Haviland, (ad- vance)	10,000	
April 14. To W. Strickland, (ad- vance).....	10,000	
	29,000 at one per cent.	290 00

For short charge of commission in
act rendered March 2, 1829, viz:

On \$207,848 48, at one per cent.....	2,078 48	
Deduct amount charged and incurred..	2,007 84	
		70 64
		430 00

E. E.

TH. FILLEBROWN, JR.

TREASURY DEPARTMENT,
Fourth Auditor's Office, December 7, 1829.

I certify the within to be a correct transcript of the original account of Thomas Fillebrown, jr., on file in this office, with report No. 353, dated October 31, 1829.

T. H. GILLISS,
Acting Fourth Auditor.

TREASURY STATEMENTS.

- 1st. Contracts made in 1829.
- 2d. Payments, Miscellaneous Claims.
- 3d. Payments, &c., Collectors' Revenue.
- 4th. Payments, sick and disabled seamen.

FEBRUARY 9, 1830.—Read and laid upon the table.

TREASURY DEPARTMENT, *February 8, 1830.*

SIR: In obedience to the act "concerning public contracts," approved April 21, 1808, and the "act further to amend the several acts for the establishment and regulation of the Treasury, War, and Navy Departments," approved the 2d of March, 1809, I have the honor to transmit—

First Statement of contracts made during the year 1829.

Second. A statement of payments made according to law, at the treasury of the United States, during the year 1829, for the discharge of miscellaneous claims, not otherwise provided for.

Third. A statement of the contracts and purchases made by collectors, for the revenue service, during the year 1828.

Fourth. A statement of the expenditure of the marine hospital fund for the relief of sick and disabled seamen, during the year 1828.

I have the honor to be, respectfully, your obedient servant,
S. D. INGHAM,
Secretary of the Treasury.

Hon. SPEAKER *House of Representatives.*

Statement of contracts made during the year 1829.

Date and duration of contract.	Object or thing contracted for.	Contractors' names.	Sum to be paid.	Places where to be performed or delivered.
February, 1829, to February, 1830----- April 2, 1829 -----	Medical services to sick and disabled seamen. Erection of a custom-house at Portland, Me--	Dr. C. A. Beatty----- Nathan Howe, Henry Dyer, and Eben. Wilson.	\$100 00 14, 035 00	Georgetown, D. C. Portland, Me.
April 1, 1829, to April 30, 1830 -----	Lodging, boarding, medicines, and medical aid to sick and disabled seamen.	Drs. Martin and Matthews.	1, 083 33	Elizabeth City, N. C.
June 30, 1829, to April 30, 1830 -----	do-----do-----	Board of managers of Savannah poor-house.	1, 500 00	Savannah, Ga.
June 17, 1829-----	Erection of a custom-house at Newport-----	William Tallman & James C. Bucklin.	7, 900 00	Newport, R. I.
May 1, 1829, to April 30, 1830-----	Lodging, boarding, medicines, and medical aid to sick and disabled seamen.	Dr. Danforth P. Wight----	400 00	Barnstable, Mass.
September 30, 1829, to April 30, 1830-- Do-----do----- Do-----do-----	do-----do-----do----- do-----do-----do----- Medicine and medical aid to sick and disabled seamen.	Dr. R. Randolph----- Nathan Coral----- Dr. Timothy W. Waldron--	466 67 266 00 23 34	Petersburg, Va. Bath, Me. Do.
October 1, 1829, to April 30, 1830-----	Lodging, boarding, medicine, and medical aid to sick and disabled seamen.	Dr. Daniel Fisher-----	95 00	Edgartown, Mass.
October 16, 1829 ----- April 1, 1829, to June 30, 1829-----	Building a revenue cutter----- Supply of rations to crew of revenue cutter Vigilant.	Webb & Allen----- John Cahoon, per ration--	6, 540 00 20	New York. Newport, R. I.
July 1, 1829, to September 30, 1829 -- October 1, 1829, to December 31, 1829-- November 6, 1829, to January 6, 1830--	do-----do-----do----- do-----do-----do----- Supply of rations to crew of revenue cutter Portsmouth.	do-----do-----do----- do-----do-----do----- Charles Waldron-----	20 20 13½	Do. Do. Portsmouth, N. H.

NOTE.—The collector at Portsmouth was authorized, on the 20th of June, 1829, to contract for the purchase of a vessel, for the sum of \$1,635, to be employed as a revenue cutter on the New Hampshire station. This, with other contracts in relation to the repairs of cutters and boats for revenue purposes, will be included in the next annual report of the Register.

S. D. INGHAM, *Secretary of the Treasury.*

Statement of payments made according to law at the treasury of the United States during the year 1829, for the discharge of miscellaneous claims not otherwise provided for; stated in pursuance of the act of March 3, 1809.

Warrants.		In whose favor.	Amount.
No.	Date.		
2134	1829. March 3	To George Gibbs for services in 1822 in taking an inventory and an account of all the Spanish documents and archives.....	\$135 00
2134	----do----	To John A. Cavedo ----do-----	81 00
2134	----do----	To John M. Fontaine ----do-----	81 00
			\$297 00
2135	----do----	To James G. Ringgold, attorney of the United States for the middle district of Florida, for his compensation for arguments before the court of appeals for the Territory of Florida in the case of the Register and Receiver against Robinson & Swearingen, and Lewis Gregory ...	300 00
2136	----do----	To William Wirt, for his fee in the case of the United States against the Bank of Somerset, in the circuit court of the United States for the district of Maryland.	500 00
2137	----do----	To Fulwar Skipwith, for sundry expenses incurred and defrayed by him, in Paris, in the prosecution of the claim of the United States against the estate of Joseph J. Miller, one of the firm of Whelan & Miller, for the sum of \$23,616 50.....	299 06
2139	----do----	To Richard S. Coxe, for his professional services in assisting the Attorney General at a session of the Supreme Court of the United States, January term, 1827, in three cases in which the United States were parties....	750 00
2140	----do----	To Benjamin L. Lear, for his professional services in the negotiation and conveyance in relation to the Northumberland estate, in Virginia, and in relation to the proper conveyance of two houses on Greenleaf's Point from the Columbian College to the United States	80 00
2142	----do----	To Samuel Fry, for his services as clerk in the office of the secretary of West Florida from July 31 to October 7, 1821	207 00
2145	----do----	To Henry Eddy, for balance due to him for drafting a bill in chancery against the corporation and individuals composing the President, Directors, & Company of the Bank of Edwardsville, its trustees and debtors, and prosecuting the same in the district court of Illinois from April, 1825, to June, 1828, including expenses of all kinds	400 00
2146	----do----	To Henry M. Breckenridge, for services in examining the translations of two folio volumes, containing about 900 pages, of all the documents relating to lands in West Florida, commencing November 1 and ending December 1, 1828.....	120 00
2147	----do----	To Henry M. Breckenridge, for services rendered as interpreter and translator to the governor of Florida from July 17 to October 8, 1821.....	225 00
2182	March 10	To John H. Owen, receiver of public moneys at St. Stephens, for his services in discharge of his duties under the provisions of an act of Congress confirming the reports of the register and receiver at St. Stephens, passed March 2, 1829	250 00

STATEMENT—Continued.

Warrants.		In whose favor.	Amount.
No.	Date.		
2202	1829. March 14	To Thomas Scott, attorney and agent for the Treasury Department in the ejectment case of the lessees of Duncan McArthur vs. John Reynolds, &c., for his services and expenses.....	\$1,023 20
2141	3	To William Clark, agent in transmitting cents to banks and custom-houses, for amount of his payments to his agent, James Rush, for payments made by him, for freight, insurance, cooperage, portorage, &c., including his agent's commission on \$13,961 24.....	\$559 15
2387	April 6	Same	116 19
			675 34
335	July 23	To James Rush, agent for the Treasurer of the United States for ditto, including commission on \$8,475.....	\$104 59
744	Oct. 20	Same	182 39
			286 98
2449	April 29	To William Doherty, for amount paid by him in pursuance of instructions from the Secretary of the Treasury of the 27th August, 1827, for taxes due for the year 1828, on lands of the late Charles Simms, situate in the State of Ohio, and for information respecting said lands, with which sum Charles Simms, late collector of Alexandria, is to be charged.....	59 75
102	June 25	To Edgar Macon, for professional services rendered in the case of the libel filed in the superior court of the southern judicial district of Florida against the United States revenue cutter Marion	100 00
334	July 22	To William Phillips, for amount paid by him pursuant to instructions, for taxes and costs, for the years 1826 and 1827, on two-thirds of a tract of land, containing 509 $\frac{3}{4}$ acres, in Toby township, Pennsylvania, levied on by the United States as the property of Francis Johnson, one of the securities of Sharp Delany, late collector of the customs, Philadelphia.....	23 75
52	Sept. 18	To John M. Berrien, Attorney General, for his expenses and services to and at New York, in examining into the affairs of the house of Thomas H Smith & Son.....	500 00
733	Oct. 17	To Olmsted & Bailhache, being for publishing in the Ohio State Journal the notice of the surveyor of the Virginia military land district, in the State of Ohio, as required by the act of 24th February, 1829.....	5 00
832	Nov. 20	To Benjamin Cowell, clerk of the district court of the United States for Rhode Island, being the expense incurred by him in 1828, in advertising "an act extending the time for the redemption of land sold for direct taxes."	8 25
			6,110 33

T. L. SMITH, *Register.*TREASURY DEPARTMENT, *Register's Office, January 16, 1830.*

A statement of contracts and purchases made by collectors for the revenue service during the year 1828.

THOMAS FILLEBROWN.

51

Collectors.	Districts.	Contractors, or from whom purchased or hired.	Vessels in the service, including cutters.					Weights, scales, gauging instruments, &c.	Total.
			Payments for vessels purchased.	Vessels hired.			Supplies, including rations.		
				Rate per month.	Time.	Payments.			
				Mos. Ds.					
Stephen Thacher	Passamaquoddy	H. D. Hunter					\$2,287 95		\$3,181 04
		Lemuel Crackbon					181 82		
		Robert Huston					471 68		
		C. Noyes and Gideon Stetson					239 59		
Samuel A. Morse	Machias	D Sawyer	\$13 00						13 00
Josiah Hook	Penobscot	William Foster	100 00						100 00
Daniel Lane	Belfast	Joshua Dillingham	67 00						67 00
John B. Swanton	Bath	Cornelius Jarber		56	\$51 12				51 12
Isaac Ilsley	Portland	Ruel Drinkwater					682 60		809 60
		Lemuel Dyer	107 00						
		Wyre Nobb & Co						\$20 00	
		William Pearce		6 00	30 00				
Timothy Upham	Portsmouth	Samuel R. Trevett							30 00
H. A. S. Dearborn	Boston	B. Dearborn, and A. Babcock & Co.					1,830 00		2,669 25
		W. White and others						839 25	
Russell Freeman	New Bedford	W. Cranston & Son, and William Coffin.	130 00						
Thomas Cook, jr.	Edgartown		210 00						
Nathaniel Bullock	Bristol	James Coit and W. H. Pitman	72 69						72 69
Christopher Ellery	Newport	John Cahoon					1,063 26		1,063 26
Richard Law	New London	Frederick Lec.					1,182 51		1,182 61

STATEMENT—Continued.

Collectors.	Districts.	Contractors, or from whom purchased or hired.	Vessels in the service, including cutters.					Weights, scales, gauging instruments, &c.	Total.
			Payments for vessels purchased.	Vessels hired.			Supplies, including rations.		
				Rate per month.	Time.	Payments.			
				Mos. Ds.					
Mathew Myers	Oswegatchie	Ab. S. Cummins	\$30 00						\$30 00
Jonathan Thompson	New York	Henry Cahoon and others					\$3,359 81	\$781 85	4,141 66
Thomas Forster	Presque Isle	Justice & Richards, and others	3,661 86						3,661 86
William Jones	Philadelphia	W. W. Polk and others	124 00				6,635 65	97 00	6,856 65
Allen McLane	Delaware	Peter Maull	66 00						66 00
James H. McCulloch	Baltimore	J. A. Webster and others					3,229 34	58 90	3,288 24
Moses Myers	Norfolk	J. McKenzie, J. S. Westwood, and others.					3,773 13		3,773 13
James R. Pringle	Charleston	Jos. Doan, Wilkie, and others	333 87				8,534 90	25 00	8,893 77
John Stevens	Savannah	Thomas Payne					1,837 75		
		Bradley, Cleghorn, and Wood					1,335 29		3,536 72
		Rahn & Ryerson, and others					272 20	91 48	
John N. McIntosh	Brunswick	Jacob Roenbaugh					823 50		823 50
Archibald Clarke	St. Mary's	John Stotesburg					638 17		638 17
William Pinkney	Key West	W. & E. De La Montague	100 00						100 00
David L. White	Apalachicola	Samuel Shannon and others							37 71
Addin Lewis	Mobile	G. Harrison and Wm. Foster					4,534 06		
		Joseph Hall & Co.					703 11		
		Henry Spearing					545 74		
		J. Campbell, P. Launsury, and others.					503 93		6,286 84

[illegible]

T. L. SMITH, Register.

TREASURY DEPARTMENT, December 29, 1828.

Statement of contracts made relative to light-houses, floating-lights, beacons, buoys, stakeages, &c.

Date.	Object.	Contractors.	Price.
1827. Dec. 1	Building a house for the keeper of Cape Hatteras light-house.....	Pharaoh Farrow.....	\$1,200 00
1828. Aug. 12	Building a light-house, dwelling house, &c., on Cove Point, in Maryland.....	John Donahoo.....	5,685 00
4	Fitting up light-house with, patent lamps, reflectors, &c.....	James Geddes.....	550 00
27	Building a light-house and dwelling house at Portland harbor, on Lake Erie, in New York.....	Thomas B. Campbell.....	2,700 00
Sept. 6	Fitting up light-house, with patent lamps, reflectors, &c.....	Thomas B. Campbell.....	650 00
Nov. 1	Building a light-house and dwelling house on Pamlico Point, North Carolina.....	Benjamin Runnyon.....	4,950 00
Sept. 15	Fitting up light-house, with patent lamps, reflectors, &c.....	Winslow Lewis.....	700 00
Dec. 22	Rebuilding floating light-vessel, stationed at Smith's Point, in Virginia.....	Isaac Talbott.....	4,000 00
1829. Mar. 10	Erecting a tower, with a bell and clock machinery, on Pool's island, in Maryland.....	William Simpson.....	1,900 00
April 10	Fitting up the light-house on the west chop of Holmes' Hole with new patent lamps, reflectors, &c.....	Winslow Lewis.....	245 00
30	Placing and keeping stakes, buoys, and flag-staffs in Providence river.....	Asa Armington.....	132 00
May 11	Building a light-house, dwelling house, &c., near Fort Gratiot, in Michigan Territory.....	Lucius Lyon.....	4,700 00
18	Erecting a beacon on Spindle Rock, at the mouth of Black Rock harbor, in Connecticut.....	Seymour Taylor.....	5,000 00
23	Erecting a tower, with a bell and machinery, near the light-house at Beaver Tail, R. I.....	David Melville.....	1,140 00
June 6	Building a light-house and dwelling house at the mouth of St. John's river, in the Territory of Florida.....	Winslow Lewis, Benjamin Beal, and Jairus Thayer.....	9,400 00
May 23	Fitting up light-house, with patent lamps, reflectors, &c.....	Winslow Lewis.....	800 00
June 6	Building a light-house and dwelling house near St. Mark's harbor, in the Territory of Florida.....	Winslow Lewis, Benjamin Beal, and Jairus Thayer.....	10,500 00
19	Fitting up light-house, with patent lamps, reflectors, &c.....	Winslow Lewis.....	900 00
July 11	Building a dwelling house and two light-houses on the northwest point of Block island, in Rhode Island.....	John Clark and Henry Eldred.....	3,700 00
6	Fitting up light-house, with patent lamps, reflectors, &c.....	Winslow Lewis.....	600 00
Aug 1	Building a dwelling house and light-house on Hendrick's head, in Maine.....	Joseph Berry.....	1,883 00
6	Erecting a monument on the eastern point of the harbor of Gloucester, in Massachusetts.....	Ebenezer Bent.....	1,040 00
	Erecting a monument on a rock near Swansett, in Massachusetts.....	Winslow Lewis.....	1,000 00

10	Building a light-house and dwelling house at or near Back River Point, in the Chesapeake bay, in Virginia, and fitting up the light-house with patent lamps, reflectors, &c.....	Winslow Lewis.....	4,250 00
Sept. 5	Building a light-house and dwelling house near Otter Creek Point, in Michigan Territory, and fitting up the light-house with patent lamps, &c.....	Charles Jackson	3,673 00
10	Building two light-houses and two dwelling houses on the flats, two miles north of Kinderhook upper landing, called the drowned lands, in New York	Walter Butler.....	5,800 00
Oct. 10	Building stone walls to secure the bank of the light-houses near Kinderhook	Walter Butler.....	1,067 00
Dec. 15	Building a light-house and dwelling house at Cleveland, on Lake Erie, in Ohio, and fitting up the light-house with patent lamps, reflectors, &c.....	Levi Johnson & Stephen Woolverton.....	3,997 00
Oct. 5	Stakeage in Core sound, including Old Topsail inlet to Beaufort, in North Carolina.....	James N. Styron.....	29 75
9	Stakeage in Albemarle sound, Crockton shoals, marshes, &c., placing buoys, &c., in North Carolina	Joseph Rollins.....	170 00
Nov. 6	Stakeage of the swashes, Wallace's channel, Upper roads, Teache's Hole, &c., placing buoys, &c., North Carolina.....	Benjamin Mason	179 00
25	Stakeage from the mouth of Pamptico river, including Pungo river, to Washington, North Carolina	David Watson.....	49 00
Dec. 4	Stakeage from the mouth of Neuse river to Newbern, North Carolina	Arvin Sampson.....	30 00

S. PLEASANTON, Acting Com. Rev.

TREASURY DEPARTMENT, Fifth Auditor's Office, January 30, 1830.

Statement of the expenditure of the Marine Hospital Fund,

Ports.	Agents.	Amount of expenditure.	Number admitted	Time for which the returns were made.
Belfast.	Daniel Lane	\$52 05	4	2d and 3d quarters...
Waldoborough	Denny M'Cobb.....	315 64	7	1st, 2d, and 4th qrs..
Wiscasset	Francis Cook.....	213 72	7	3d and 4th quarters..
Bath	John B. Swanton..	608 02	7	4 quarters.....
Portland	Isaac Ilsley	1,300 07	-----	do.....
Passamaquoddy	Stephen Thacher ..	190 28	7	3d and 4th quarters..
Kennebunk.....	G. Wheelwright....	6 06	1	3d quarter.....
Portsmouth.....	Timothy Upham....	432 53	34	4 quarters
Penobscot	Samuel R. Gilman..	98 53	2	2d and 3d quarters...
Barnstable	Isaiah L. Green ...	404 00	4	4 quarters
Newburyport	James Prince.....	10 10	5	2d, 3d, and 4th qrs..
Gloucester.....	William Pearce....	100 49	4	1st, 3d, and 4th qrs..
Holmes' Hole.....	Thomas Cooke	343 40	-----	4 quarters.....
Boston.	H. A. S. Dearborn..	8,102 97	477	4 quarters
Providence	Thomas Coles.....	1,082 12	61	do.....
Bristol and Warren..	Nathaniel Bullock ..	310 94	11	do.....
Newport	Chris. Ellery.....	622 37	12	do.....
New London.....	Rich. Law.....	239 58	11	do.....
Middletown	Henry Wolcott.....	148 29	11	do.....
Sag Harbor	Hen. T. Dering	13 52	2	3d quarter.....
New York.....	Jona. Thompson ..	13,668 01	927	4 quarters
Great Egg Harbor ..	Gideon Leeds	681 38	35	4th quarter, and 1st, 1829.
Philadelphia	William Jones	8,786 80	361	4 quarters
Baltimore	Jas. H. M'Culloh..	6,543 79	179	do.....
Georgetown	Thomas Turner.....	204 00	14	4 quarters
Alexandria	Humphrey Peake....	245 76	22	do.....
Tappahannock.....	John Dangerfield..	643 23	21	do.....
City Point.....	James Robertson ..	454 71	-----	1st and 2d quarters ..
Norfolk.	Moses Myers.....	2,630 14	-----	do.....
Richmond	James Gibbon.....	478 16	-----	do.....
Elizabeth City.....	Asa Rogerson	1,053 21	17	do.....
Wilmington.	James Owen	188 87	20	do.....
Washington.	Thomas H. Blount..	181 74	9	do.....
Newbern	Francis Hawkes....	359 89	24	1st, 2d, and 3d quarters
Ocracoke	Joshua Taylor.....	765 07	-----	2d and 3d quarters...

for the relief of sick and disabled seamen, for the year 1828.

Place of admittance.	Rate of expenditure.	Remarks.—1 per cent. commission allowed the agents in all cases.
Private houses.....	\$2 50 per week ...	With passage money and doctor's bill.
Do	\$1 to \$2 per week...	With doctor's bill, &c.
Do	\$2 to \$3 per week...	With doctor's bill and passage money, &c.
-----	-----	Amount paid to the steward, physician, &c., per agreement for the year.
-----	-----	Amount received, paid to the overseers of the poor, by contract, for the relief of the sick and disabled.
Private houses.....	-----	With physician's bill for visits and medicine, funeral expenses, &c.
Do	33½ cents per day ..	With passage money to Boston.
Do	\$2 50 to \$2 80 per week.	With passage money, doctor's bills, funeral expenses, &c.
Do	\$2 50 to \$3 50 per week.	With physician's bills, visits, and medicine.
-----	-----	With physician, \$400 per annum, by agreement.
-----	-----	Passage money, and stage to the hospital.
Private houses.....	\$2 50 to \$4 per w'k.	With doctor's bills, &c.
-----	-----	Boarding and all other expenses, per agreement per year, for all that arrive at the port.
Chelsea hospital....	All expenses	Physician, \$1,000 per annum; steward, \$500; medicine, passage money, &c.
Private houses.....	-----	Doctor's visits, medicine, funeral expenses, &c.
Do	\$2 to \$2 50 per w'k.	Passage money and funeral expenses, with doctor's bill.
Hospital.....	\$2 50 to \$3 per w'k.	Physician, \$400 per annum, passage money &c.
Private houses.....	\$2 50 per week ...	Physician, \$150 per annum.
Do	\$2 to \$2 50 per week.	Physician, attendance and medicine, passage money, and funeral expenses.
Do	-----	Do. do. do.
Hospital	\$3 per week	All expenses, superintendent, \$250, funeral expenses, \$5 each; 74 deaths.
Private houses.....	\$1 50 to \$3 per week.	Doctor's bill for visits and medicine, with funeral expenses.
Penn. hospital	50 cents per day...	Including all expenses, except funerals and clothing; these separate charge.
Marine hospital	-----	Including all expenses, with \$31 passage money, and \$60 extra medicine.
Private houses.....	\$2 to \$3 per week...	Doctor's bill, \$100 per annum.
Alms house.....	-----	Board, medical attendance, &c.
Private houses.....	\$2 50 to \$3 per week	With doctor's bills, attendance and medicine.
do.....	-----	No returns of the number of men, nor of their expenses. This charge for doctor's salary.
Marine hospital.....	-----	Including all expenses, with physician's salary, \$840 per annum.
do.....	-----	Ditto, physician and superintendent, per contract, \$450 per annum, and bill of medicine.
Private houses.....	\$1 25 to \$2 50 per week.	Number of men for 1st quarter, doctor's bills and medicine 2d, 3d, and 4th quarters, by contract, at \$225 per quarter.
-----	50 cents per day...	Including board, medical attendance, &c.
-----	\$3 per week.....	With doctor's bill and medicine.
-----	do.....	Ditto, and funeral expenses.
-----	-----	Supported by contract, at \$1,500 per annum, funeral expenses added.

STATEMENT

Ports.	Agents.	Amount of expenditure.	Number admitted.	Time for which the returns were made.
Plymouth	Levi Fagan	\$78 67	6	4 quarters
Edenton	Samuel Tredwell			No returns
Beaufort	James Manney	64 89	2	3d quarter
Charleston	James R. Pringle	3,994 58		4 quarters
Georgetown	Thomas L. Shaw	38 38	1	3d quarter
Savannah	John Stephens	2,373 24		4 quarters
Darien	John N. McIntosh	22 72	1	4th quarter
St. Augustine	John Rodman	150 87	4	2d, 3d, and 4th quart's
Pensacola	Robert Mitchell	65 64	10	do
Mobile	Addin Lewis	604 29	28	4 quarters
New Orleans	Beverly Chew	7,708 06	324	4th quarter
Key West	William Pinckney	496 11	24	4 quarters
		67,076 89	2,692	

—Continued.

Place of admittance.	Rate of expenditure.	Remarks.—1 per cent commission allowed the agents in all cases.
-----	\$1 50 to \$2 per week	With doctor's bills, medicine, funeral expenses, and passage money.
-----	50 cents per day---	Board, &c, medical visits, and medicine.
-----	-----	This sum includes moneys paid city treasurer, and payments made for the sick on board the revenue cutter Marion, and some other charges. Contract with the city to pay all expenses in the port, for moneys received by the collector for this object.
-----	\$3 per week-----	With doctor's bill, for visits and medicine.
-----	-----	Supported by contract 1st and 2d quarters, at \$2,500 per annum; 3d and 4th, at \$1,800, with \$100 per inspector, with funeral expenses and passage money.
-----	\$3 per week-----	Board and nursing.
-----	do-----	With doctor's bill, medicine, and passage money.
-----	\$1 25 per day-----	Attendance.
City Hospital-----	50 to 75 cts. per day	Including all expenses, doctor's visits on board vessels, medicine, and funeral expenses.
Hospital-----	75 cents per day---	Physician's salary, \$1,000 per annum; also, charge for apothecary and matron; also included \$250, for 1st and 2d quarters, for 30 men at Louisville hospital, allowed by direction of the President of the United States.
-----	\$4 to \$5 per week--	Doctor's bill, medicine, and funeral expenses.

T. L. SMITH, *Register*.TREASURY DEPARTMENT, *Register's Office*, January 16, 1830.

NAVY DEPARTMENT, 2d March, 1829.

SIR: It was my intention before I left the department to have submitted to the consideration of the other commissioners of the navy hospital fund your claim and account for compensation for attending to the disbursement of the moneys of the fund which have passed through your hands since your appointment as secretary. I consider the claim perfectly just, and do not doubt but a fit compensation would have been made could the question have been submitted to the board. Neither the responsibility nor the labor are embraced within your duties as secretary, and if any other person had been appointed to perform them, an allowance must necessarily have been made to him.

I do not doubt when the commissioners shall understand the merits of the claim, that no hesitation will be felt on the subject.

Nothing but my severe and protracted indisposition during the whole winter, has heretofore prevented its adjustment.

I am respectfully, &c.,

SAM. L. SOUTHARD.

THOMAS FILLEBROWN, Esq.,

Secretary navy hospital fund, Washington.

Deposition of John H. Eaton.

Questions to be propounded to the Hon. John H. Eaton, Secretary of War, and one of the Commissioners of Navy Hospitals, which, with the answers thereto, are to be given and received as evidence on the trial of the suit instituted against Thomas Fillebrown, jr.

Question 1st. Has it not heretofore been, and is it not now, the practice of the government, in the service connected with the War Department, to allow to officers called on to make disbursements of public money, other than such as come within their usual and proper duties, to allow a premium or per centage on such disbursements; and is not two and a half per centum the usual allowance in such cases?

Answer. Officers of the engineer corps superintending "fortifications," are, by regulation of the War Department, allowed two dollars extra a day, upon condition that it shall not exceed two and a half per cent. upon the amount by them disbursed; principals too, engaged on topographic duty, are placed upon the same footing as those who are in the superintendence of fortifications. This does not extend to assistant quartermasters and commissaries. When thus acting, they are authorized to receive not exceeding twenty dollars a month.

Question 2d. Before you placed your official signature to the remarks appended to Mr. Fillebrown's account, (upon which account the suit now pending is based,) was he called on for explanation, or were any vouchers or papers relative thereto examined by you, and did you examine the merits of his claim before signing said remarks?

Answer. I do not now recollect the particulars of Mr. Fillebrown's account, or the grounds and reasons upon which I decided. His claim,

I believe, rested upon an allowance of — per cent. for disbursements of public moneys, the hospital fund. His demand for this allowance is based on the ground that it is a usage of the government. Had any established regulations been produced to me, I should have felt myself authorized to admit the force of them and to be controlled by them.

Question 3d. Did you not, at the time of signing said paper, consider it a matter of official form, to give validity to a transaction, the particular details of which were more immediately the duty of other officers of the government; and had you been called on to examine into the merits of the case, as subsequently explained to you by the papers exhibited by Mr. F., would you not have considered his charges reasonable and proper?

Answer. I did not consider it "matter of official form." I did not act upon such grounds. My reasons were these: unacquainted with the rules and practice of the Navy Department, which more particularly had charge of the hospital fund, under and by virtue of the practice of the government, I was uninformed of any settled and established practice, and hence looked as a guide to what the law directed. In the acts of Congress regulating this disbursement, I could find no authority sanctioning it, nor was I apprised of any settled practice of the government which gave it sanction. There are many *regulations* as to allowances, (I speak in reference to the War Department,) which, as regards disbursements, have and do receive all the force and effect of enactments by Congress. Officers superintending fortifications, or principals employed on topographic duty—officers with brevet rank conferred; those detailed for duty in the military bureau offices, all receive additional allowances, which grow out of regulations of the department, and are not the result of any enacted laws upon the subject. Double rations, and the commutation of them in the several bureaus attached to the War Department, are matters of regulation heretofore in former times established, and not of legislative enactment.

June 7th, 1830. In my own handwriting are the answers.

J. H. EATON.

George W. Dashiell's evidence.

It was proved by George W. Dashiell, on the part of the United States, that William Brown was a clerk in the State Department upon a fixed salary; and that Edward Jones, John Laub, Enoch Reynolds, William Parker, John Wells, jr., George Macdaniel, Nicholas Harper, and himself, were clerks in the Treasury Department, in the year 1828, upon fixed salaries; and that Samuel D. King was a clerk in the General Land Office; and that Lewis Edwards, Nathaniel Fry, Nathan Towson, Brooke Williams, Thomas G. Ringgold, William Wade, Alfred Mordecai, and Trueman Cross, were all clerks in the War Department upon fixed salaries; and that Benjamin Homans was a clerk in the Navy Department also upon a fixed salary; and that the moneys for the payment of clerk hire in those departments were disbursed by these officers; and that Peter Hagner, the Third Auditor,

and Roger Jones, the Adjutant General, and Alexander McComb, Chief Engineer, and that Mr. Suter, a clerk in the Post Office, under the direction of the Postmaster General, annually disbursed the moneys necessary for the contingent expenses of their departments; and the said witness further proved that he was and is still a clerk in the Treasury Department, and that the warrants of these disbursements pass through his hands into the hands of the different clerks and officers who are to disburse them as above, and that he has no knowledge that any commission or compensation was ever paid or allowed by the government for these disbursements.

The accounts of said officers, not passing through the hands of witness, he has no knowledge whether or not they either claimed or received any compensation in the shape of commissions or otherwise, for making said payments. The said several officers, in making said payments, and keeping said accounts, were always understood to be performing duties properly appertaining to the offices they respectively held.

George Macdaniel's evidence.

George Macdaniel proved that he had been, for about twenty years, a clerk in the office of the Fourth Auditor; that he disbursed the contingent funds of the navy, as special agent of that department; and, during the said period, he regularly settled his accounts, charged a commission on said disbursements, which was always allowed until about the time of his ceasing to perform the said duties in 1829; that, during the same period, he also paid to the several clerks in the Fourth Auditor's office their salaries; this he always considered an official duty; and he never either charged or received a commission therefor.

And before the jurors aforesaid withdrew from the bar of the court here, the said United States, by their attorney aforesaid, filed in court here, the following second bill of exceptions, to wit:

Second bill of exceptions.

THE UNITED STATES
against
THOMAS FILLEBROWN, Jr. }

Upon the trial of this cause, the defendant offered to prove, by the testimony contained in the preceding bill of exceptions, the general usage of the different departments of the government in allowing commissions to the officers of government upon disbursements of money under a special authority not connected with their regular official duties. The counsel of the United States objected to the admission of parol evidence to prove such usage. But the court permitted the evidence to be given, and the same was given accordingly. To which opinion and admission of the court, the plaintiffs, by their counsel except, and this their bill of exceptions is signed, sealed, and ordered to be enrolled this 26th of May, 1831.

WILLIAM CRANCH. [SEAL.]
JAMES S. MORSELL. [SEAL.]

Extract from "statement showing the names and the amount paid to officers of the army of the United States for extra services, to whom paid, and for what, and where employed, in the years 1822, 1823, 1824, and 1825, ascertained from accounts settled in the office of the Third Auditor, prepared in pursuance of a resolution of the House of Representatives of March 6, 1826," being report of the Third Auditor, document 41, House of Representatives, 19th Congress, and 2d session, referred to in exceptions at page 22.

Names and rank.	Purposes, places, and periods.	Amount.
Abert, J. J., Major-----	Per diem while surveying Potomac canal, from July 1 to October 8, 1824-----	\$141 00
	Per diem while on topographical duty, surveying from May 24 to August 4, 1823-----	124 50
	Per diem while surveying Chesapeake and Ohio canal, from September 27 to November 15, 1825-----	75 00
	Commissions on disbursements in relation to said canal in the second, third, and fourth quarters of 1825-----	161 27
		<u>501 77</u>
Bernard, Simon, General...	Extra services as member of the Board of Engineers in January and February, 1822-----	265 50
	Extra services from March 11 to April 30, 1822-----	274 50
	Extra services whilst surveying Chesapeake and Delaware canal, from July 15 to 27, 1823-----	58 60
	Extra services from September 17 to December 31, 1823-----	477 00
	Extra services whilst surveying the harbor of Erie, from July 28 to September 6, 1823-----	229 50
	Extra services on survey, &c., from May 7 to July 31, 1824-----	387 00
	Extra services whilst engaged on canal routes from the Ohio to Lake Erie, and from Pittsburgh to Philadelphia, from August 1 to October 31, 1824-----	414 00
	Extra services whilst employed in relation to a canal across the Isthmus of Cape Cod and between Boston harbor and Taunton river, from November 1 to December 11, 1824-----	180 00
	Extra services as member of the Board of Engineers, 14 days, between August 5 and October 31, 1825-----	63 00
	Extra services on Chesapeake and Delaware canal from January 1 to 24, 1824-----	108 00
		<u>2,457 10</u>
Bankhead, James, Major---	Two and a half per cent. commission on his disbursements at Fort Moultrie in the first and second quarters of 1822-----	67 36
	Two and a half per cent. commission in the first quarter of 1824-----	2 62

EXTRACT—Continued.

Names and rank.	Purposes, places, and periods.	Amount.
Bankhead, James, Major— Continued.	As member of a court-martial at New London in June, 1822	\$99 66
		169 64
Burch, E., Daniel, Captain..	Two and a half per cent. on disbursements in the quartermaster's department at Louisville, Kentucky, in the third quarter of 1822	49 93
	As witness to a court-martial at Baton Rouge in February and March, 1823	157 20
	Per diem allowance of three dollars per day for marking out a road from Pensacola to St. Au- gustine, from October 21 to December 30, 1823.....	234 00
		441 13
Babcock, Samuel, Major....	Two and a half per cent. on his disbursements at Fort Delaware during the year 1822	669 52
	Per diem allowance for disbursements, from Jan- uary 1 to October 31, 1823.....	608 00
	Two and a half per cent. commission on disburse- ments, from January 27 to September 30, 1824..	300 73
	Two and a half per cent. commission on disburse- ments in relation to the Ohio and Mississippi rivers in 1825.....	36 36
		1,614 61
Bache, Hartman, Captain....	Per diem whilst employed surveying coast of South Carolina, from February 15 to April 18, 1822	94 50
	Per diem whilst surveying, from August 12 to November 3, 1822.....	126 00
	Per diem whilst surveying, from March 6 to June 6, 1823.....	139 50
	Per diem whilst surveying the Susquehanna, from July 26 to August 31, 1823.....	55 50
	Per diem whilst surveying coast of South Caro- lina, from February 10 to May 26, 1824.....	160 50
	Per diem whilst surveying coast of South Caroli- na, from December 24, 1824, to June 29, 1825..	282 00
	Per diem whilst surveying at Holmes' Hole, Massachusetts, from November 4 to 19, 1825..	24 00
	Two and a half per cent. commission on his dis- bursements at Charleston, South Carolina, from March 26 to September 30, 1825	133 22
	Two and a half per cent. commission on his dis- bursements at Holmes' Hole, in four quarters of 1825	4 67
		1,019 89
Bradford, William, Major..	Two and a half per cent. commission on disburse- ments made by him at Fort Smith, from Jan- uary 1, 1818, to February 28, 1822.....	90 17

EXTRACT—Continued.

Names and rank.	Purposes, places, and periods.	Amount.
Brewerton, Henry, Lieutenant.	Two and a half per cent. commission on disbursements at Fort Jackson in the second quarter of 1823.....	\$94 05
	Two and a half per cent. commission on disbursements at Mobile Point in the third quarter of 1823.....	65 75.
	Two and a half per cent. commission on disbursements at Mobile Point, first quarter of 1824 ..	7 50
	Extra pay for issuing provisions at Fort Jackson, from November 6 to 30, 1824.....	16 16
	Per diem allowance as disbursing officer, &c., at New York, from April 1 to June 30, 1824, on account of fortifications.....	182 00
		<u>365 96</u>
Brown, Jacob, Lieutenant..	Two and a half per cent. commission on disbursements on the barracks at Baton Rouge, first and second quarters of 1824, as assistant quartermaster	<u>102 28</u>
Chase, H., William, Captain.	Per diem allowance as disbursing officer on the Gulf of Mexico, for the year 1822, on account of fortifications.....	639 50
	Per diem allowance at the Rigolets, from January 1, 1823, to June 10, 1824	1,094 00
	Per diem allowance at Plymouth Beach, from August 1 to November 13, 1824; from August 1 to 17, surveying the beach previous to the repairs of the same; from August 18 to November 18, 1824, as agent of fortifications in the repairs of Plymouth Beach	201 50
	Per diem allowance as agent of fortifications at the Rigolets and Chef Menteur, from July 1 to September 30, and from November 1 to December 31, 1824.....	368 00
	Per diem allowance from January 1 to September 30, 1825.....	546 00
		<u>2,849 00</u>
Childs, Thomas, Lieutenant	Two and a half per cent. commission on his disbursements at Fort Washington, in third quarter of 1824, as assistant quartermaster.....	<u>64 62</u>
Clitz, John, Lieutenant....	Two and a half per cent. commission on disbursements on account of the military road from Sackett's Harbor to Plattsburg in 1823 and 1824	50 79
	As witness to a court-martial at West Point, in August, 1825.....	44 60
		<u>95 39</u>

EXTRACT—Continued.

Names and rank.	Purposes, places, and periods.	Amount.
Delafield, Richard, Lieutenant.	Two and a half per cent. commission on disbursements made by him on fortifications at New York, to first quarter of 1822	\$106 16
	Per diem allowance as disbursing officer at Plaquemine Bend, from February 1, 1824, to September 30, 1825	1,216 00
	Per diem allowance at Fort Jackson, from October 1 to December 31, 1825	184 00
		<u>1,506 16</u>
De Russey, E. R., Captain.	Per diem allowance as disbursing officer, &c., at Mobile Point, from January 1, 1822, to March 31, 1823	1,311 00
	Per diem allowance at Fort Delaware, from November 8, 1823, to January 26, 1824	160 00
	Two and a half per cent. on disbursements at Mobile Point, in March, April, and May, 1824	124 08
	For attendance on court-martial at Annapolis	32 50
	Per diem allowance as disbursing officer at Mobile Point, from July 15, 1824, to August 31, 1825	824 00
	Per diem allowance at Fort Hamilton, from December 1 to 31, 1825	62 00
		<u>2,513 58</u>
Dillahunty, N., Jno, Lieutenant.	Per diem allowance whilst surveying Chesapeake and Ohio canal, from July 30 to October 13, 1823	114 00
	Per diem allowance whilst surveying canal routes from the Ohio to Lake Erie, and from Pittsburgh to Philadelphia, from July 13 to 28, 1824	24 00
	Per diem allowance from April 20 to September 24, 1825	223 50
		<u>361 50</u>
Hunt, F., Thomas, Capt , as quartermaster.	Two and a half per cent. commission on disbursements on account of old claims, made by him in third quarter of 1822 and first quarter of 1823	34 27
	Two and a half per cent. on account of barracks at Baton Rouge, in the fourth quarter of 1823 and first quarter of 1824	168 56
	Two and a half per cent. on account of war claims, fourth quarter 1824	4 55
		<u>207 38</u>
Hook, H , James, Captain, on duty in the office of the Commissary General of Subsistence, at Wash- ington.	Two and a half per cent. commission on provisions purchased in Georgetown and Baltimore between August 17 and October 4, 1822	179 22

EXTRACT—Continued.

Names and rank.	Purposes, places, and periods.	Amount.
Hook, H., James, Captain— Continued.	Two and a half per cent. commission on provisions purchased at different places between December, 1822, and April, 1823	\$335 28
	Two and a half per cent. commission on provisions purchased for Old Point in Dec. 1823.....	162 26
	Two and a half per cent. commission on provisions purchased for May and June, 1822.....	168 84
	Two and a half per cent. commission on provisions purchased for August and Sept. 1823.....	168 09
	Two and a half per cent. commission on provisions purchased for June, 1824.....	235 04
	Two and a half per cent. commission on provisions purchased for October and Dec. 1824	332 34
	As witness to a court-martial at Fort McHenry, in September, 1822	14 50
	As witness to a court-martial at fortress Monroe, in August, 1824	34 07
	As witness to a court-martial at New Castle, in August, 1824	56 04
	As witness to a court-martial at Old Point, in August, 1824	39 59
		<u>1,725 27</u>
Kearney, James, Major.....	Per diem allowance whilst on the survey of St. Mary's river, Maryland, from June 4 to Aug. 16, 1824	111 00
	On a court-martial at New Castle, in Aug. 1824.....	55 20
	Per diem allowance whilst exploring a canal route in Pennsylvania, from April 3 to September 30, 1825.....	231 00
	Two and a half per cent. commission on disbursements in relation to internal improvement, in 2d, 3d, and 4th quarters of 1825.....	168 15
		<u>565 35</u>
Long, H., Stephen, Major..	Two and a half per cent commission on disbursements made by him on an exploring expedition on the waters of the Mississippi in the years 1819, 1820, and 1821, allowed in February, 1823.....	164 41
	Per diem of one dollar and twenty-five cents per day on an expedition on St. Peter's river in 1823.....	67 50
	Per diem allowance whilst making an experiment for the improvement of the navigation of the Ohio river, from July 6 to October 2, 1824, and from May 22 to November 8, 1825	195 00
		<u>426 91</u>
Maurice, W., Theodore, Captain.	Two and a half per cent. commission on disbursements at Fort Washington in the years 1822, 1823, and 1st and 2d quarters of 1824	1,429 80
	Two and a half per cent. commission on disbursements at Presque Isle in the 3d and 4th quarters of 1824, and 1st, 2d, and 3d quarters of 1825.....	298 40

EXTRACT—Continued.

Names and rank.	Purposes, places, and periods.	Amount.
Maurice, W., Theodore, Captain—Continued.	Two and a half per cent. commission on disbursements at Presque Isle in the 4th quarter of 1825.....	\$61 53
		<u>1,789 73</u>
McNeill, G., Wm., Captain.	Per diem allowance whilst surveying the Chesapeake and Ohio canal, from July 5 to October 15, 1824.....	154 50
	Per diem allowance whilst surveying the Chesapeake and Ohio canal, from April 20 to September 24, 1825.....	346 50
	Two and a half per cent. commission on disbursements made by him in the 1st and 2d quarters of 1825, on account of said canal survey.....	72 99
		<u>573 99</u>
Mansfield, F. K., Joseph, Lieutenant.	Two and a half per cent. commission on disbursements at New York, up to September 30, 1824, on account of fortifications.....	37 76
	Two and a half per cent. commission on disbursements in the 4th quarter of 1824, and 1st and 2d quarters of 1825.....	11 93
	Per diem allowance as disbursing officer at New Utrecht Point from October 1, 1824, to March 31, 1825.....	364 00
		<u>413 69</u>
Story, C., Horace, Lieutenant.	Per diem allowance as engineer officer, employed on the Gulf of Mexico, from January 1 to March 31, 1822.....	121 50
	Two and a half per cent. commission on disbursements at Plaquemine Bend in the 4th quarter of 1822, and first and 2d quarters of 1823, on account of fortifications.....	784 31
		<u>905 81</u>
Totten, G., Joseph, Major..	Extra services as a member of the Board of Engineers from January 1 to April 30, 1822.....	540 00
	Per diem allowance as disbursing officer at Mobile Point from May 12 to June 11, 1823.....	62 00
	Per diem allowance as a member of the Board of Engineers at the harbor of Erie from July 28 to September 6, 1823.....	229 50
	Per diem allowance as a member of the Board of Engineers on the Chesapeake and Delaware canal from September 17, 1823, to January 24, 1824.....	643 60
	Per diem allowance as a member of the Board of Engineers on same service from the 7th to the 22d of May, 1824.....	72 00
	Per diem allowance as a member of the Board of Engineers on internal improvement from June 19 to December 9, 1824.....	783 00

EXTRACT—Continued.

Names and rank.	Purposes, places, and periods.	Amount.
Totten, G., Joseph, Major— Continued.	Two and a half per cent. commission on disbursements made by him in the 3d quarter of 1823, (collecting materials for Mobile Point)...	\$68 52
	Attending a court-martial at New Castle in March, 1824	115 70
	Per diem allowance as disbursing officer at Brenton's Point from April 1 to December 31, 1825, on account of fortifications	550 00
		<u>3,064 32</u>
Tuttle, Stephen, Lieutenant.	Per diem allowance whilst on duty with the Board of Engineers from January 1 to April 30, 1822	165 00
	Two and a half per cent. commission on disbursements on fortifications at New York in the 3d quarter of 1822	48 63
	Per diem allowance whilst surveying Thompson's island, January to April, 1823.....	142 50
	As acting assistant commissary of subsistence for May and June, 1823	40 00
	Per diem allowance as disbursing officer at Plaquemine Bend from July 1 to January 31, 1824, on account of fortifications.....	430 00
	For issuing provisions at Plaquemine in February, 1824.....	20 00
	Two and a half per cent. commission on disbursements at Oak island, Cape Fear river, in 4th quarter of 1825	62 80
		<u>908 93</u>
Poussin, T., Wm., Captain.	Amount brought forward	217 50
	Per diem allowance whilst engaged on sundry surveys from May 6 to December 10, 1824....	174 74
	Per diem allowance whilst engaged on sundry surveys from March 9 to August 4, 1825.....	260 75
	Per diem allowance whilst employed on the contemplated national road from Washington city to New Orleans from October 22 to December 31, 1825.....	177 50
	Two and a half per cent. commission on disbursements made by him in 1825 on account of internal improvements	117 73
		<u>948 22</u>

Test: W. BRENT, Clerk.

And whereas, afterwards, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and thirty-one, the United States, by their attorney aforesaid, produced and filed in court here the United States writ for the correcting of errors, of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia, in the county of Washington; and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is hereby transmitted to the said Supreme Court accordingly.

In testimony whereof, I hereunto subscribe my name, and affix the [L. s.] seal of the said circuit court for the county aforesaid, at the city of Washington, this—— day of——, eighteen hundred and thirty-ne.

W. BRENT,
Clk. Ct. Ct. Dist. Col., City of Washington.

Writ of error.

UNITED STATES OF AMERICA, ss.—*The President of the United States to the Judges of the Circuit Court of the United States for the District of Columbia, sitting for the county of Washington, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between the United States of America, plaintiffs, and Thomas Fillebrown, jr., defendant, a manifest error hath happened, to the great damage of the said United States, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of August next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right, and according to the laws and the custom of the United States, should be done.

Witness, the honorable John Marshall, Chief Justice of the said Supreme Court.

Issued the 4th day of June, 1831.

W. BRENT,
Clk. Ct. Ct. Dist. Col., City of Washington.

Citation.

UNITED STATES OF AMERICA,
District of Columbia, Washington County, ss.

To Thomas Fillebrown, jr., greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of August next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the District of Columbia, in the county of Washington, wherein the United States of America are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said United States as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable William Cranch, chief judge of the circuit court for the District of Columbia, this 4th day of June, 1831.

W. CRANCH.

Service acknowledged by Thomas Fillebrown, jr.

Copy appeal bond.

Know all men by these presents, that we are held
 and firmly bound unto Thomas Fillebrown, jr., in the full and joint sum of two hundred dollars, current money, to be paid to the said Thomas Fillebrown, jr., his certain attorney, executors, administrators or assigns, to which payment well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals, and dated this fourth day of June, in the year of our Lord one thousand eight hundred and thirty-one.

Whereas, lately, at a circuit court of the United States for the District of Columbia, sitting for the county of Washington, in a suit pending in the said circuit court, wherein the United States of America were plaintiffs, and the said Thomas Fillebrown, jr., was defendant, judgment was rendered against the said United States, and they having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas Fillebrown, jr., citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington on the first Monday of August next.

Now, the condition of the above obligation is such that if the said United States shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void else; to remain in full force and virtue.

Signed, sealed, and delivered, in presence of

[SEAL.]
 [SEAL.]

IN THE UNITED STATES COURT OF CLAIMS

THOMAS FILLEBROWN }
 vs. }
 THE UNITED STATES. }

Remarks in behalf of petitioner.

The arguments submitted in the case of Mary Reeside embrace about all we could have to say in the present. Both being the verdict of a jury and judgment of a court, (so far as a judgment could be technically rendered,) upon offset pleaded to a suit instituted by the United States against a citizen, are consequently dependent upon the same principles of constitutional and municipal law. The only difference between the cases consists in the manner in which they originated: the Reeside case being principally for money advanced and negotiated for the use of the government, or for drafts and acceptances of the Post Office Department unpaid, while the present is entirely for service performed. Both cases have also been before the Supreme Court upon writ of error; the one having been dismissed for a failure to prosecute, while the other has been passed upon and affirmed by that tribunal. They therefore stand before you in equal dignity, so far as their legal sanction is concerned, and the arguments we have submitted apply equally to both. We shall consequently feel it necessary to say but little in addition thereto in support of the present.

The record in this case shows that the United States instituted suit against Fillebrown, on May 23, 1829, upon the alleged grounds that he was a defaulter, and had improperly appropriated the government money, to the extent of \$2,700 84, for which sum he was sued in the United States circuit court for the district of Columbia, and required to give bail to discharge the judgment of the court, or surrender his body for incarceration till it was satisfied, or should be pleased to liberate him.—(See the record, p. 5.)

At this stage of the proceedings, the matter was before the government's judicial tribunals, placed there at its own instance.

Fillebrown tells you, that having a dependent family upon his hands to support, and being dismissed from his accustomed employment, and his character stigmatized with the charge of defalcation resting upon it, he found it difficult to procure occupation, or obtain means to relieve the wants of his family, while subject to the prejudice inseparable from one in his situation. And the law being slow in its progress, he resolved to petition Congress to take charge of his case and settle his account; knowing that he was not a defaulter, but that the government justly owed him. Hence, he did, on January 18, 1830, present his memorial to the two houses of Congress, praying their immediate action thereon.—(See amended petition, p. 2.)

But the suggestion being made that his case was in the hands of the judiciary, Congress refused to act; and disappointed, and writhing under the burden of oppressive delay, he was forced to abide the tedious steps of the law. He, therefore, on the first Monday in May,

1830, plead to and joined issue with the government upon its demand.—(See record, p. 5, *suprà*.)

All hopes of any other settlement than a legal contest being then destroyed by the choice and action of the government, the defendant (Fillebrown) proceeded to prepare his facts, to submit before the court and jury when the cause should come to a hearing.

With this object in view, the petitioner had his accounts with the government, as its agent and employé, fully stated and properly vouched, showing his full service and moneyed transactions and disbursements for the department under which he had been acting, and prepared his proof to sustain the same.—(See record, p. 7.)

The case came to a final hearing on May 26, 1831, when the jury, under the instructions of the court, rendered a verdict in favor of Fillebrown, and certified, upon the plea of offset, "*that the United States are indebted to the said Fillebrown in the sum of four hundred and thirty dollars.*"—(See record, p. 12.)

After the rendition of the verdict, the petitioner supposed that the amount ascertained by it to be due him would be promptly paid, and thereupon demanded the same of the Secretary of the Navy; but, much to his astonishment, that officer, instead of satisfying the petitioner's expectations, addressed a letter to the Attorney General, the honorable R. B. Taney, asking his views upon the subject, as to whether it would be legal for him to do so, when the latter functionary, being then the chief law officer of the government, responded in writing, as set forth in the original petition.

The claim not being paid, the petitioner again memorialized Congress on April 3, 1832, but it appears from the documents that he claimed a much greater sum than was allowed him by the jury, and that his prayer for relief was not confined to the verdict alone. This last-named memorial was constantly pressed before the legislative department of the government till December 22, 1848, when it was last presented to the Senate.—(See amended petition, A No. 1, pages 1 to 7.)

Various reports were made upon the memorial as last presented—some for allowing the full amount claimed, and some against it. We perceive but one, however, that was made against the payment of the verdict, but which was not finally acted upon in the Senate.

We concede that it was in the power of Congress to consider the facts, and reject at their pleasure, if they deemed it proper, the amount claimed by the petitioner beyond the sum stated in the verdict, and are, therefore, not seeking to claim anything more than the assessment of the jury.

But we claim that it is equally clear that the sum of \$430, stated in the verdict of the jury, ought to have been paid, and is now due—a fact which neither Congress nor any other tribunal has any authority to question, for reasons we have attempted to elaborate, upon the plainest principles of the Constitution, law, and justice, in the argument we have submitted in the case of Mary Reeside.

This case illustrates the precise ground we have contended for on this particular point in the Reeside case, and which we think is unanswerable in point of authority. That is, when the government sued

Fillebrown, it was proper and legal for him to plead and prove any offset he might have, and that whatever was the finding of the jury, one way or the other, was and is conclusive as to the facts upon the offset so pleaded; and, the jury having rendered a verdict upon those facts for the sum of \$430, it was only competent for the government to examine their finding according to the common law mode—new trial and writ of error. These being exhausted, and the verdict still standing, leaves an established debt of record, ascertained by the highest judicial authority—an authority, created coequal with that granted to Congress, and over which the latter can exercise no appellate or revisory power whatever.

When, however, the petitioner asked for a much larger sum than the verdict of the jury, upon other and distinct facts not passed upon at the trial, it was then the privilege and duty of Congress to consider those facts, and determine whether they meritoriously—*but not as a matter of legal right*—entitled the petitioner to relief; because the facts which were the foundation of the claim, beyond the amount of the verdict, had not been determined upon by the jury, and hence it was no infringement upon, nor impeachment of, the result of their deliberations, and was, therefore, a question which Congress might properly look into.

We think the committee which reported on this claim at 3d session of the 25th Congress took exactly the right views, so far as the questions involving the authority of Congress were concerned, part of which we will here quote:

“In May, 1829, he” (Fillebrown) “was removed from the several offices which he held, and was arrested and held to bail, at the suit of the United States, for a large sum, including the amount which he had been allowed on settlement of his accounts and that which he had retained as compensation for his services as disbursing agent.

“Upon the trial of that suit a verdict and judgment were rendered in favor of the petitioner, and the jury certified a balance of four hundred and thirty dollars to be due him from the United States for his commissions, at the rate of one per cent. upon his disbursements of the funds aforesaid, exclusive of the allowance made to him by the commissioners upon the settlement of his first account.

“He now claims, in addition to that sum, a further compensation of \$3,582, being one and a half per cent. on the whole of his disbursements in said agency. In support of this additional claim he urges the promise of ‘a suitable compensation’ for his services when he entered upon the duties of his agency.

“The committee think the amount charged by the petitioner in his account, which was allowed, and his subsequent claim to retain one per cent., are conclusive of his own understanding of what would be ‘a suitable compensation’ for making the disbursements committed to his charge.

“The evidence in this case establishes the justice of the petitioner’s claim to the sum of four hundred and thirty dollars, and the committee report a bill for his relief.”—(See Report No. 2, 3d session 25th Congress.)

Urging nothing in reference to the merits of Fillebrown’s claim, set

forth in his memorial, beyond the amount stated in the verdict, we think the committee, in making the above report, drew the proper line of distinction touching their constitutional and lawful authority to act; that they had the right to consider the facts as to meritoriousness of the claim beyond the verdict, and to reject the application if they chose, but that they had no right to attempt a reconsideration of the facts upon which the verdict was founded, and that they properly reported a bill for its payment. This, we think, was the true interpretation of the Constitution, and was paying proper deference to the requirements of the 7th amendment, which so emphatically forbids the re-examination of any fact once tried by a jury, as was the case in the rendition of this verdict.

But a most remarkable feature in this case is this: The documents show you that Fillebrown used his utmost endeavors to have it taken charge of by Congress after the suit was brought and he had given bail for his appearance. He did not wish to be subject to the "law's delay," but wished Congress to make immediate inquiry into his conduct, and determine whether he was or was not a defaulter, and, if not, to restore him to his character with an honorable acquittal, and to pay him what he should be able to show the government owed him. But this Congress very distinctly, as well as properly, refused to do. The court was certainly the proper forum in which to dispose of the questions of law and legal rights involved, and Congress determined they should do so. And then, when the results should be so emphatically determined against the government in both circuit and supreme courts, is it not both monstrous and startling to hear it hinted that the decision and verdict of the court and jury should not be respected, or that it was not conclusive?

Fillebrown's memorial, presented on the 18th of January, 1830, was rejected because a suit was pending. He was forced to defend that suit, and a verdict and judgment was ultimately rendered in his favor. Upon that verdict and judgment the United States sued out their writ of error to the Supreme Court, where Fillebrown was again forced to incur the expense of employing counsel to defend his case, when, after a full hearing, the proceedings in the circuit court were affirmed. Certainly, we must suppose that the government, in taking these steps, and imposing such onerous burden upon Fillebrown, meant to abide the result; if not, then the most infamous fraud must have been contemplated by those who conducted the proceedings—a fraud which can never receive the sanction of this court, aside from any constitutional or legal inhibition of the right to review it.

In the record of the trial in the circuit and supreme courts you have all the facts as stated, proven, and passed upon, in those tribunals. The legality of each step, and merits of every fact, have been passed upon and settled. Did the right otherwise exist to review the same, you could not expect to alter the figures and dates before you, which are not even disputed, nor could you expect the oral testimony to be different, were the persons now all living and accessible who gave the same. And were not this the case, could you, under any circumstances, give as much credit to oral testimony in the year 1856, pertaining to facts which transpired in 1830, as you could to the testimony of the

same witnesses, testifying concurrent with the date of these facts, when everything was fresh in their memory? Certainly you could not, and this reason alone should stop further inquiry.

After the rendition of the verdict, and its affirmation by the Supreme Court, the whole question of right, both as to the law and the facts, was wholly determined, so far as there existed or is known to our institutions any authority to re-examine it; nor can there be any reason assigned to the contrary that would not as readily uproot and unsettle every vestige of principle or justice upon which any transaction to which the government may be a party can be founded.

The Solicitor remarks, in the conclusion of his brief, that this case, though trifling within itself, is the forerunner of others of greater magnitude, and that for that reason he attributes great importance to it.

While such an avowal does not reach nor alter the merits of the case in any way, we cannot refrain from remarking that we are aware of none but this and the Reeside judgment which are unpaid, and for the credit of the government we hope there is no more. It would, indeed, be a singular fact if there did exist many verdicts of juries and judgments of the courts against the government unpaid. If there be, there is certainly a radical defect in the administration of justice at work somewhere, or for some cause which the people who support this *republic* are not aware of. We do not believe, so far as we can learn, that there are any others except these two; but, if there were a thousand, they would only constitute so many just demands which the government is most arbitrarily repudiating.

Upon this claim the petitioner insists he is entitled to interest from the date of the verdict on the 26th day of May, 1831.

The only ground upon which we can urge the payment of interest, as a legal right, is the fact that it is the verdict and judgment of a United States court and jury; and which, we think, ought to be sufficient to require it. Upon this subject we respectfully refer the court to our argument, and the authorities cited, upon the payment of interest in the Reeside case. It is a universal principle in the jurisprudence of all civilized governments that the judgments and decrees of their judiciary shall bear interest from the moment of their rendition. We can conceive of no reason why this government should desire to repudiate those plain rules of a law so essential in meting out that "justice" which it is pledged to secure to its citizens, and which alone can enable it to render them "just compensation" for their "private property appropriated to public use."

STEWART & COXE,
For Petitioner.

IN THE COURT OF CLAIMS.—No. 1.

ON THE PETITION OF THOMAS FILLEBROWN.

Brief of the United States Solicitor.

This is a claim for \$430, on account of disbursements alleged to have been made by the claimant, some time between the years 1825 and 1829, of navy hospital funds. The petitioner was a clerk in the Navy Department at the time, and in receipt of one thousand dollars per annum salary. The navy commissioners, of which the Secretary of the Navy was the chief, and the Secretaries of the Treasury and War Departments were assistants or advisers, made the claimant secretary of their board, and contracted for his compensation at \$250 per annum. He was afterwards required to pay out funds belonging to the navy hospitals, for which he charged one per cent. commission.

The questions of the power of the commissioners so to employ the claimant, the fact of such employment, the performance of the service, and the rates of compensation, were tried in a suit at law before the circuit court of the District of Columbia, where they were determined for the petitioner, and, on appeal, the decision of the circuit court was affirmed by the Supreme Court. On the principles of that decision, and according to the finding of the jury, the balance claimed by the petitioner was due.

But it is contended for the United States that this Court is not concluded by the finding of a jury or the decisions of any court. This is not an inferior tribunal to the Supreme Court of the United States, but to Congress, and is to be governed in its decisions and course of procedure, not by the decisions of the courts, but by the principles applicable to the legislative body.

All the facts on which this claim is founded must be submitted to this Court, and all the questions passed upon by the courts of law are here again to be considered as open and original questions, as Congress, to which this Court is auxiliary and subordinate, not only has the right to do, but is bound to do before acting.

It was contended, on the hearing of this case before the Supreme Court, that the act of 1797 (United States Laws, p. 512,) repealed so much of the act of 1795 as gave the Comptroller final jurisdiction in the settlement of the accounts of disbursing officers.

This proves nothing in the case before us. It is admitted, that if either the Comptroller or the courts decide that an officer in possession of funds is entitled to keep them, the government cannot compel him to pay them over. Congress has by law committed so much to them, and enabled them to pass authoritatively and finally upon the question of whether there is anything due from the individual to the government; but it has committed no power to either to pass on the alleged indebtedness of the government to an individual. It has not delegated that power, and cannot. By the Constitution, Congress alone can have the ultimate decision of that question. Congress alone can appropriate the public money, and the power of appropriation involves,

of necessity, the duty of considering the propriety or justice of the appropriation, and, therefore, it must investigate the facts and interpret the laws and contracts which occasion the demands for money from the public treasury. This power cannot be delegated by Congress without abdicating its office. It follows, therefore, that whilst Congress may, and unquestionably would, pay great deference to the opinion of the Supreme Court in the interpretation of a law, yet when an appropriation is asked, Congress must interpret for itself. And this Court, instituted by Congress to assist in the investigation of questions involving appropriations, to perform its duty and render the assistance expected from it, must investigate for itself, and judge for itself, and accordingly it is required to present in its report to Congress *the facts* of each case, with its opinion thereon, together with all the evidence and the arguments of counsel. There are cases in which, should Congress fail to appropriate, it would be a virtual dissolution of the government, and the failure would in such cases be a failure in constitutional duty. This remark applies to appropriations for the support of the government according to the plain requirements of the Constitution and the laws; and yet, even in such cases, it is with Congress to judge; and it is only because the duty is so plain, and the laws so explicit in their requirements, that we are enabled to say that Congress would be wanting in its duty if it failed to pass the laws. It belongs to no other branch of the government to define the duties of Congress, or the occasions on which it shall exercise the powers belonging to it, and so it is of the co-ordinate branches of the government. They must in every case judge for themselves within their proper spheres.

It is for the legislature to pass laws, the judges to interpret them when suits arise, and the Executive to execute them. In the performance of these several duties it will often happen that these several departments of the government are called on to interpret the same laws, but the action of each is independent, within its proper sphere. Neither is bound to conform to the opinion of the other, where, by the Constitution and laws, such opinion is not coupled with power to enforce it; and, in the absence of such power, such opinions are entitled to respect so far only as they are supported by reason in the minds of those on whom the responsibility of action is devolved.

I maintain, therefore, it is not sufficient, to authorize this Court to give a favorable judgment for the claimant, that he shall produce and show to the Court the judgment of the Supreme Court on the same legal questions, and the verdict of a jury on the same matters of fact; because, although the opinion and verdict are conclusive on all matters within the jurisdiction of the Court, they are not so as respects the same questions of law and fact arising out of the jurisdiction of the Court; and, therefore, whilst the record of the Court here relied on is evidence which closes and balances the account of the claimant with the Treasury Department, because the law gives that effect to it, it has not such force before this Court; being merely an argument—of great authority I admit—but still an argument which is not conclusive, and which in this case, and many others, has failed to satisfy Congress. The claimant must, then, set forth in his petition the particulars of the service he has rendered, for which he claims compen-

sation, the law which authorizes his employment and compensation, and the amount remaining due and unpaid, which he claims, and not the judgment of a court where he was sued as a debtor, and wherein a portion of the compensation was allowed by the court to set off the indebtedness charged against him.

This claim is trifling in itself, but it is the forerunner of others, involving hundreds of thousands, and therefore I attach great importance to the question I have endeavored to present.

M. BLAIR.

IN THE COURT OF CLAIMS.

THOMAS FILLEBROWN *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

In the year 1829 the United States instituted a suit against the petitioner in the circuit court for the District of Columbia. This suit was so proceeded in that on the 26th day of May, A. D. 1831, a verdict was rendered in favor of the defendant, that he did not assume upon himself in manner and form as the United States had complained, and thereupon the court gave judgment that the United States take nothing by their writ and declaration, and that the petitioner go thereof without day, &c. The jury, at the time of bringing in their verdict, filed in court the following certificate: "The jurors empannelled in the case of *The United States vs. Thomas Fillebrown, jr.*, find, upon examining the accounts filed, that the United States are indebted to the said Fillebrown in the sum of four hundred and thirty dollars." No further action was taken thereon by the court.

The petitioner claims the sum of \$430.

The certificate of the jury is no evidence whatever that the amount embraced by it is due the petitioner. The certificate is not a verdict either in form or substance, and the court took no further action upon it than merely to permit it to be filed.

There was, however, evidence submitted to the jury in that case which we think is proper evidence in this case in favor of the original merits of the petitioner's claim. This evidence consists of a deposition of Samuel L. Southard, who is now dead, and documents from the executive departments of the government. The deposition of S. L. Southard is proper evidence, because the case in which it was taken and read was between the parties in this case, and in reference to the same subject-matter, and the witness is dead. The documentary evidence is, in itself, properly admissible in this case.

The case of *The United States vs. Fillebrown*, above mentioned, was carried to the Supreme Court, and is reported in 7 Peters, 28. The principles of the petitioner's claim as it now stands before this Court were settled by the Supreme Court.

The matters in dispute between the parties in the above mentioned suit were as follows:

1. The United States claimed against the petitioner for overcharge

of salary from May 6 to November 7, A. D. 1825, six months one day, at \$250, making \$125 68.

Mr. Southard proves that the petitioner was duly appointed secretary of the board of commissioners of the navy hospital fund, at a salary of \$250 a year; that some time after his appointment, when it was considered proper to keep separate records and files of whatever related to this fund, he was directed to procure the necessary books and make the necessary examinations into the records and files of the navy office and Fourth Auditor's office, and do whatever was required to place the papers belonging to the fund in a proper condition; and that for this service he was allowed to ante date his appointment six months, and to draw a warrant for his salary for that period. Upon this item the Supreme Court remark: "With respect to the \$125 claimed for six months' salary Mr. Southard is very explicit. This allowance, he says, was made for extra services, and related to a time previous to his appointment, and that the allowance had the approbation of the board. This was a service not required or considered by the board as coming within his duty as secretary under his appointment, and a stipulated compensation agreed to be paid him therefor. It is not perceived what possible objection can exist against his being allowed this stipulated sum. Whether or not it was more than a just compensation for his services is a matter which this Court cannot inquire into. Indeed, that has not been pretended, if he is entitled to anything beyond his salary of \$250."—(7 Peters' R., 45.)

2. The United States disallowed the petitioner's claim of one *per centum* on the disbursements made by him as disbursing agent of the board, amounting to the sum of \$2,007 84.

In relation to this item the Supreme Court say:

"With respect to the commissions Mr. Southard says, that subsequent to the appointment of the defendant as secretary the commissioners were enabled, by appropriations and collecting money belonging to the fund from various sources, to proceed to apply the funds to the establishment of navy hospitals, as required by the act of Congress; that these funds were placed in the hands of the treasurer of the United States, as the treasurer of the commissioners; and that, in collecting and disbursing the fund it was found indispensable to have an agent, who should attend carefully to it, and be responsible to the board; that this did not belong to the duties of the secretary, but that it was thought best to give the agency to him on account of his acquaintance with every part of the interest of the fund and his fitness to discharge the duty; that he was appointed the agent with the understanding that he should receive a suitable compensation for the services he should render in that capacity; that it was the understanding of the commissioners that he should receive compensation in the mode and according to the practice of the government in other similar cases; that he is under the impression that this was to be by a *per centage* on the money disbursed, and that he is also under the impression that he did, by the authority of the board, allow one or more of the accounts presented by the defendant, in conformity to the facts and principles he has detailed.

"From this testimony, it is very certain that Mr. Southard consid-

ered the agency of the defendant in relation to the fund as entirely distinct from his duty as secretary, and for which he was to have extra compensation; and it is fairly to be collected from this deposition that all this received the direct sanction of all the commissioners. But whether it did or not, it was binding on the board, for the Secretary of the Navy was the acting commissioner, having the authority of the board for doing what he did, and his acts were the acts of the board in judgment of law. It was, therefore, an express contract entered into between the board or its agent and the defendant; and it was not in the power of the board, composed even of the same men, after the service had been performed, to rescind the contract and withhold from the defendant the stipulated compensation. There is no doubt the board composed of other members had the same power over this matter as the former board. But it cannot be admitted that it had any greater power. The rejection, therefore, of these claims of the 7th of September, 1829, after all the services had been performed by the defendant, can have no influence on the question."—(7 Peters R., 45, 46.)

Again: "The authority of the commissioners to appoint a secretary has not been denied; and this same authority must necessarily exist to appoint agents and superintendents for the management of the business connected with the employment of the fund; and which, in the absence of any regulation by law on the subject, must carry with it a right to determine the compensation to be allowed them."—(7 Peters R., 44.)

Again: "If the board had authority to employ the defendant to perform the services which he has rendered, and these services have been actually rendered at the request of the board, the law implies a promise to pay for the same."—(7 Peters R., 48.)

We follow the views of the Supreme Court as to the effect of Mr. Southard's testimony, and are, of course, bound by the principles of law established by that court.

The first item above mentioned was.....	\$125 68
The second item above mentioned was.....	2,007 84

Making a total of.....	2,133 52
From which the United States deducted for salary from 6th February, A. D. 1829, to the 16th of May, A. D. 1829, which had not been charged in the account rendered by the petitioner, three months eleven days.....	70 14

Leaving a balance claimed by the United States of.....	<u>2,063 38</u>
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The petitioner on his part insisted that he was entitled to his salary, and in addition thereto to a commission of one per centum on his disbursements. He therefore claimed as follows:

(1.) His salary from February 7 to May 16, A. D. 1829, three months ten days, at \$250 a year. (This the government conceded to be just, and allowed, therefore, as above stated, \$70 14).....	\$69 36
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(2.) Commissions on the following disbursements, at one per centum:

1829, March 3. To T. Newton, for land	\$9,000	
April 4. To J. Haviland, (advance)	10,000	
April 14. To W. Stickland, (advance)	10,000	
	<u>\$29,000</u>	\$290 00

The testimony of Mr. Southard and the documentary evidence show that these disbursements were made by the petitioner as the disbursing agent of the board.

(3.) For short charge of commissions in account rendered March 2, A. D. 1829, to wit:

On \$207,848 48, at one per cent	\$2,078 48	
Deduct amount charged and received	2,007 84	
	<u>70 64</u>	

Making his whole claim the sum of.....\$430 00

The documentary evidence shows that besides the above mentioned sums paid to T. Newton, J. Haviland, and W. Stickland, respectively, the petitioner disbursed also the above named sum of \$207,848 48.

It is apparent, therefore, that the only matters really in dispute between the parties were (1) the above mentioned sum of \$125, and (2) the commissions claimed by the petitioner; and that if the petitioner was entitled to these two items, he is now entitled to the above mentioned sum of \$430, the amount claimed by him.

That the petitioner was entitled to the above named sum of \$125 is clear, we think, beyond dispute.

It is equally clear, too, from the evidence in this case and the legal principles adjudicated by the Supreme Court, that the petitioner was entitled to a commission of one per centum on the disbursements made by him as the disbursing agent of the board.

We are therefore of the opinion that the petitioner is entitled to relief, and shall report to Congress a bill in his favor for the sum of \$430.

REPRESENTATIVES OF JAMES HOOKER, DECEASED.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HERMAN HOOKER and others *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Petitioners' brief.
3. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this third day of February,
[L. S.] A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

Petition.

HERMAN HOOKER. *et al.*, heirs-at-law and representatives of James Hooker, deceased, *vs.* THE UNITED STATES.

To the honorable the Judges of the Court of Claims:

The petition of the Rev. Herman Hooker, Maria Goodspeed, Emily Ransom, James C. Hooker, Mary J. Mann, and others, children and grandchildren of James Hooker, deceased, late of the State of Vermont, respectfully represents:

That James Hooker, deceased, the father and grandfather of your petitioners, was a non-commissioned officer in the war of the revolution, of the Connecticut line, and on the continental establishment;

he served in said war till the end thereof, and was participant in many important battles—the battles of Monmouth, Princeton, Trenton, and others. When the war was over he received an honorable discharge, and was paid off in continental money, which was almost worthless. He settled in the State of Vermont, where he reared a family of children in Christian and patriotic principles; and there he died on the 9th day of August, 1844.

On the passage of the act of Congress of the 18th March, 1818, granting pensions for life to officers and soldiers of the revolution who should comply with certain requirements and conditions therein specified, the said James Hooker doing all that the law required, was placed, as the law directed, on the pension list of the United States as a pensioner for life, at the rate of eight dollars per month; that he drew said pension regularly till after the passage of the act of May 1, 1820. By this last named act the pensioners under the act of 1818, that they might retain their pensions, were required to perform other and new stipulations not designated in that act, and to show that they were in such indigent circumstances as to be unable to support themselves without the assistance of their country; which the said James Hooker, being a conscientious man, and possessed of a small property, that, with the labor and assistance of his children, and with rigid economy, might yield him support without the assistance of his country, was unwilling to do. He was, therefore, dropped from the pension list, and the payment of his pension was discontinued. But, under the act of May 15, 1828, he was restored to the pension list, and received a pension under that act as long as he lived, but at a lower rate than was allowed under the act of 1818, as aforesaid. He always thought he had a legal claim to more than was paid to him, and regarded his being dropped from the list, under the act of 1820, as a great hardship.

In view of these facts the petitioners believe that James Hooker, having complied with the terms and conditions proposed by the act of March 18, 1818, was, in virtue of the same, vested with a right to receive from the United States eight dollars per month during his life; and of which right he could not be divested, without his consent, by any subsequent act; that he had a just claim against the United States for the amount at eight dollars per month from the time the last payment was made to him, under the act of 1818, to the day of his death, less the amount he received under the act of May 15, 1828; and that, at his death, the right to the same enured to your petitioners as the heirs-at-law and representatives of the said James Hooker; and therefore they pray this claim, and ask a report of this honorable Court in their behalf to the Congress of the United States; and they will pray, &c.

J. F. POLK,

Counsel for Claimants.

IN THE UNITED STATES COURT OF CLAIMS.

The Rev. HERMAN HOOKER and others, heirs and representatives of
James Hooker, deceased,

vs.

THE UNITED STATES.

Brief of the petitioners.

THE FACTS.

James Hooker, the ancestor of the petitioners, was a non-commissioned officer in the war of the revolution, and served until the end thereof. He became a pensioner of the United States under the act of Congress of the 18th of March, 1818, having done all that the act required for the attainment of that end.—(Statutes at Large, vol. 3, p. 140, secs. 1 and 2.) Afterwards, to wit, the 1st of May, 1820, Congress passed another act, whereby the pensioners under the act of 1818, aforesaid, were required to perform other and new stipulations; failing to do which they were not to be paid after the 4th of March, 1820, and the Secretary of War was directed to cause their names to be struck from the list of pensioners under said act. James Hooker, the ancestor of the petitioners, failed to perform the new and additional stipulations, and his name was struck from the list of pensioners under the act of 1818, aforesaid.

THE ARGUMENT.

It is argued, on the part of the petitioners, that the requirements of the act of 18th March, 1818, were terms voluntarily proposed by the government to individuals of certain classes of citizens, the performance of which by any of the latter completed a contract between the parties, which could not be annulled or avoided by any subsequent act of Congress without the consent of the other party.—See Story on Contracts, sections 429, 430, 453, and 454, and references, 2d Blackstone, (Christian's edition,) pp. 445, 446; 5th Cranch, (*Violett vs. Patton*), p. 150.

The act of 1818, aforesaid, expressly declares that every non-commissioned officer as therein designated who shall have substantiated his claim to a pension in the manner therein directed shall receive a pension from the United States "of eight dollars per month during life," provided he shall have relinquished his claim to every pension previously allowed him. He is then directed what to do to entitle him to the provisions of the act; the judge before whom the testimony is taken is required to transmit it with the proceedings to the Secretary of War; and, finally, the Secretary of War is required, if he is satisfied the applicant comes under the provisions of the act, to place him on the pension list of the United States, to be paid, &c.

James Hooker, in the manner prescribed by the act, established his right to the provisions thereof, as a non-commissioned officer, to the

satisfaction of the judge and of the Secretary of War, and was placed, accordingly, by the latter, on the pension list; and he so continued and was paid till stricken off under the act of 1820, aforesaid; of all which there is abundant record evidence.

The contract having been thus completed, and having gone into operation, it was not competent for the government rightfully to deprive James Hooker of its benefits without his assent; and he had a right to reject the new and additional terms proposed by the act of 1st May, 1820, chap. 53, for his performance. The act, therefore, so far as it attempted to impose new conditions and penalties for the non-performance thereof, was null and void; and the stopping of payment of the pension stipulated by the act of 1818, aforesaid, and the striking of the name of James Hooker from the list of pensioners for his non-performance of said additional terms, was a *wrong*, for which, as a measure of damages, the petitioners are deemed to be entitled to an allowance of interest, in addition to the arrears of pension due to James Hooker from the time when he was last paid under the act of March 18, 1818.

J. F. POLK,
Of Counsel for the Petitioners.

IN THE COURT OF CLAIMS.

HERMAN HOOKER *et al.*, heirs and representatives of James Hooker,

vs.

THE UNITED STATES.

LORING, J., delivered the opinion of the Court.

The case is submitted on the petition; and in that it is alleged that James Hooker was a non-commissioned officer in the war of the revolution, in the Connecticut line, and on the continental establishment, and served until the end of the war. That under the statute of 18th March, 1818, (3 Stat. at Large, 410,) entitled "An act to provide for certain persons engaged in the land and naval service of the United States in the revolutionary war," he was a pensioner for life, and as such received eight dollars per month until the passage of the act of May 1, 1820, (3 Stat. at Large, 567,) entitled "An act in addition to an act entitled 'An act to provide for certain persons engaged in the land and naval service of the United States in the revolutionary war,' passed the eighteenth day of March, one thousand eight hundred and eighteen." That then the said James Hooker being unable conscientiously to make the proof of indigence required by the act last mentioned, he forbore all attempts to do so, and was dropped from the pension list. That he was restored to the pension list under the statute of 15th May, 1828, entitled "An act for the relief of certain

surviving officers and soldiers of the army of the revolution," and received for the residue of his life the pension provided for his grade by that act, which the petition alleges was less than the pension he had received under the statute of May 18, 1818.

The petitioners then allege that they are the children and grandchildren of said James Hooker and his representatives and heirs-at-law, and they claim the amount of balances due to him as pensioner under the act of 18th May, 1818, from 1st May, 1820, to 19th August, 1844, when he died.

The act of 18th May, 1818, related to and provided for only those survivors of the war of the revolution who, by reason of "*reduced circumstances in life*," should be in need of assistance from the country for support; and it specified the evidence that should be furnished of such "*reduced circumstances*." The act of May 1, 1820, was "in addition to" the act of May 18, 1818, and referred only to the same class of pensioners, but required other and further evidence of such reduced circumstances.

It is claimed by the petitioners that James Hooker, by complying with the requirements as to "*reduced circumstances*" specified in the act of 18th May, 1818, acquired "*a vested right*" in the pension it gave, which could not be divested, without his assent, by the subsequent act of 1st May, 1820. But it is observable that the latter act did not alter in any way the grounds or reason on which the act of 18th May, 1818, granted its pension, but altered only the evidence by which that ground or reason was to be shown. And we are of opinion that it was entirely competent for Congress to do this, and thus to protect the bounty of the nation from abuse. The act of May 18, 1818, was not a contract for the particular evidence it specified; the pension it granted rested on no legal obligation, and was in fulfilment of none; it was the voluntary offering of a grateful country, and therefore the country might prescribe or modify its terms, and determine its continuance; while it continued it was an annual gift to a certain class of persons, and the pension list and the pension certificate were only the evidence that the pensioner belonged to that class. The act itself was a law of Congress which it might amend or repeal, and when James Hooker, in his conscientious action, declined or forbore to proffer the evidence the act of May 1, 1820, required, he ceased, by due operation of law, to be a pensioner of the United States.

The act of 15th May, 1828, had no reference whatever to the "*reduced circumstances*" of its pensioners, but included all officers and soldiers who "*became entitled to receive a reward of eighty dollars under a resolve of Congress of May 15, 1778.*" It was, therefore, as being within that requirement of the act, that James Hooker was pensioned under it. And the proviso of the act of 15th May, 1828, declares "*that no non-commissioned officer, &c, who is now on the pension list of the United States shall be entitled to the benefit of this act.*"

Thus James Hooker's title to his pension of full pay for life, under the act of May 15, 1828, rested on the fact that he was not on the pension list under the act of 1818; he averred that fact by claiming and receiving his pension sixteen years under the act of 15th May,

1828. And after such averment, and such receipt on the strength of it, he, if living, would be, and all persons claiming through him are, estopped from denying that fact or impugning it in any way.

On the facts alleged in the petition, we are of opinion that the petitioners show no title to the relief they pray.

CHARLES ST. JOHN CHUBB, EXECUTOR OF LEWIS WARRINGTON AND OTHERS.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

CHARLES ST. JOHN CHUBB, EXECUTOR, AND OTHERS,
vs.
THE UNITED STATES.

1. The petition of the claimant.
2. Miscellaneous Document of the House of Representatives No. 74, 30th Congress, 1st session, agreed to be read in evidence, transmitted to the House of Representatives.
3. Two letters from the Secretary of the Navy, transmitted to the House of Representatives.
4. United States Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the
[L. s.] seal of said Court, at Washington, this third day of February,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the United States Court of Claims:

The petition of Charles St. John Chubb, executor of the last will and testament of Lewis Warrington, Philip F. Voorhees, John Percival, Herman Thorn, and Eliza Hamilton, administratrix of the estate of C. B. Hamilton, most respectfully represents: That on the 29th of April, 1814, the officers and crew of the United States sloop-of-war Peacock (Lewis Warrington being then commander of the Peacock

John B. Nicholson being lieutenant of said vessel, Philip F. Voorhees being then a lieutenant of said vessel, Herman Thorn being then purser of said vessel, John Percival being then sailing-master of said vessel, and C. B. Hamilton being surgeon of said vessel) captured, after a well-contested action, his Britannic Majesty's sloop-of-war Epervier, and conducted her with her crew into the port of Savannah. That she was there libelled, and decreed by the district court of the United States as "prize of war to the captors," the decree of the court being, as shown by a certified copy thereof from the records of that court, herewith filed, being exhibit A in the accompanying printed documents, at page 7 of said exhibit, as follows, viz: "It is ordered, adjudged, and decreed, that the said sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, be condemned as prize of war *to the captors*, and sold, after due notice, by the marshal, and the proceeds be *distributed* as the law directs respecting captures made by the public armed vessels of the United States, after payment of costs and charges." The Epervier had on board certain specie, which was also decreed by said court (as shown by said exhibit A, on page 15) as "prize of war *to the captors*, to be distributed." "The captors" were the persons mentioned as above in this petition, and the other officers and the crew. But Mr. John Eppinger, the marshal, after selling the Epervier and receiving the proceeds, made the mistake of paying one-half thereof, and one-half of the specie captured in the Epervier, into the treasury of the United States; and the object of this petition is to make a respectful application that *this*, their property, be restored to them.

The law of the United States passed April 23, 1800, directs, respecting captures, as follows: "The proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, *be the sole property of the captors.*"

That the Epervier was of "equal force" to the Peacock is shown as follows: The law of July 16, 1798, shows that the "*force*" of a vessel is the number of guns, which law is as follows: "*Be it enacted, &c., That the sum of six hundred thousand dollars shall be, and hereby is, appropriated to enable the President of the United States to cause to be built and equipped three ships or vessels, to be of a force not less than thirty-two guns each, and of the dimensions and model which he shall deem most advantageous,*" &c. That the Epervier was of equal force to the Peacock is officially shown by the *United States*, as follows: The Secretary of the Navy, in an official report to the Senate, dated March 14, 1814, transmits a table of the names, rates, &c., of the vessels of the United States navy, of which exhibit B is an extract, in which the force of the Peacock is shown to be eighteen guns; and said Secretary, in an official report to the Senate, dated October 3, 1814, transmits the official report of the commander of the Peacock of the capture of the Epervier, of which exhibit C is a copy, in which the Epervier is officially stated to be of the force of *eighteen* guns. Also, the official report of Lieutenant John B. Nicholson of her arrival, exhibit D, proves her to be of the force of *eighteen* guns. Thus the Peacock and Epervier being proved by the United States *official* reports

to be of "equal force," "the proceeds of" the *Epervier*, and "the goods taken on board," were, in the language of said law, "the sole property of the captors;" and therefore the decree of the court, as above mentioned, that the *Epervier* and specie was "prize of war to the captors" was in accordance with said law and said official report of the Navy Department.

Three other official communications of the Navy Department demonstrate that it was the decision of that department that the captors possessed the sole interest in the *Epervier*, viz: One of June 11, 1814, exhibit F, states: "In respect to your prize, the *Epervier*, * * *

* * * I am ready to negotiate with any agent authorized *by the captors for the purchase of the Epervier*." This communication does not state for the half of the *Epervier*, but for *the Epervier*, thereby expressing the *whole* of the *Epervier*. The communication of June 16, 1814, exhibit G, states: "It is, however, proper that the prize and her stores should be preserved in good order for the '*benefit of the captors*;' " thus stating for the benefit of the *captors*, not for the benefit of the captors and the United States jointly. The letter of the Navy Department of July 24, 1814, exhibit H, states: "I regret that no agent for the *captors* has yet appeared to negotiate with this department for the sale of *the Epervier*." This letter does not state for the captors' half of the *Epervier*, but for "the *Epervier*," thereby expressing *the whole* of the *Epervier*.

But the marshal, Mr. John Eppinger, after selling the *Epervier* and receiving the proceeds of the sale, made the mistake of paying one-half of the same, and one-half of the specie captured, into the treasury of the United States, as shown by the receipts of James Marshall, cashier, at page 17 of exhibit A, and as also shown by the official statement of said John Eppinger, marshal, dated August 12, 1814, exhibit I; and, but for your petitioners being away at sea at the time, *contending for their COUNTRY's* rights in neglect of their own, they would have prevented this mistake.

That their title to it was a VESTED right, which, so far from being divested by the mistake of *the district marshal* in paying it into the treasury, instead of to the captors, *could not be divested even by the extensive power of Congress itself*, is shown by the solemn decision of the Attorney General of October 17, 1820, in another prize case, at page 296 of published "Opinions of Attorneys General," as follows: "In my opinion, *Congress* intended nothing more by this act than to substitute the \$255,000 in lieu of the proceeds of the sale of the prize vessels, had they been sold under the decree of court, without the most distant intention of affecting, in any manner, the mode of distribution, either as to the quantum or the persons authorized to take; indeed they COULD NOT, IF THEY HAD INTENDED IT, have produced such an effect, because that would have been to DIVEST A VESTED RIGHT."

By the capture the memorialists furnished a valuable vessel, at a time when needed, to the government, and a considerable amount in specie when its credit was low, and they cannot believe that the nation, under *all these* circumstances, will withhold this *debt due* them.

The petitioners respectfully represent that these proceeds thus, 1st, by law solemnly enacted to be "the *sole property* of the captors;"

2d, thus solemnly decreed by the court to be *their property*; 3d, thus shown by the United States official report and law to be a capture from an "equal," and thus a *vested right* acquired by the captors to the whole; and 4th, admitted by the Navy Department in three official communications to be *their property*—*is their property*. They therefore petition your honors that this their property be restored to them, in accordance with the constitutional provision, "nor shall private property be taken for public use without just compensation."

Since this claim has been before Congress, two unfavorable reports (one in the Senate by the committee asking to be discharged) have been made in relation to it, but they were made in consequence of the want of the principal testimony in support of it; since, however, the official testimony has been obtained from the records of the United States court of Georgia, and official correspondence from the Navy Department, *no* adverse report has ever been made. On the contrary, since this official testimony has been obtained, the Senate have, at three different sessions, unanimously passed bills for the relief of the claimants; and the Committee of Naval Affairs of the House of Representatives have made a favorable report three times, which were not reached; all of which will fully appear by the documents accompanying Senate bill No. 35, on the calendar of the House of Representatives, referred by a resolution of that House to your honorable Court.

The action in Congress on this claim is as follows, viz: On May 2, 1836, memorial referred in Senate to Committee on Naval Affairs, and nothing done. On January 9, 1837, referred in Senate to Committee on Naval Affairs, and nothing done. On March 21, 1838, referred in Senate to Committee on Naval Affairs, and on July 7, 1838, committee discharged from further consideration of it. In 28th Congress, 1st session, on January 23, 1844, in the House of Representatives, memorial was referred to Committee on Naval Affairs, which, on February 28, 1844, made an adverse report, vide page 505 of Journal. In 30th Congress, 1st session, on April 26, 1848, as vide its Journal, page 735, bill No. 435 was reported, and memorial and documents accompanying ordered to be printed, being Miscellaneous Document No. 74, and not reached on the calendar. In 31st Congress, 1st session, Committee on Naval Affairs reported bill No. 210, and report No. 202, vide page 728 of its Journal; and at same session, Senate bill No. 121 passed Senate on August 19, 1850, as vide page 564 of its Journal; and as House bill No. 210 had been previously referred to Committee of the Whole, bill 564 was referred to Committee of the Whole, and bill not reached for debate. In 31st Congress, 2d session, on March 3, 1851, Mr. Schenck moved, as vide page 438 Journal, Committee of the Whole be discharged from further consideration—ayes 69, noes 48, not two-thirds; and on same day Mr. Meade made same motion, but not two-thirds. Being the last working day of the session, there was an intense pressure of the public business, and *still there was a very large majority* in favor of Committee of the Whole being discharged, which discharge, as is well known to your honorable Court, *is considered as a test question*, and shows that *the sense of a very large majority was for its passage*. In 31st Congress, 2d session, bill No. 38 passed Senate on February 7, 1852, as vide its

Journal, page 188, and on February 12, 1852, as vide House Journal, page 345, was referred to Committee on Naval Affairs; which Committee, though desirous to report the bill, was not reached in the call of committees for reports by the Speaker, during the *only remaining* 19 days of the session. In the 33d Congress, 1st session, bill No. 35 passed the Senate, as vide its Journal, page 107, on January 17, 1854; and this bill was reported favorably in the House of Representatives on June 13, 1854, vide page 997 of its Journal, but not reached for debate in consequence of the pressure of the public business before the House of Representatives. And, as in duty bound, your petitioners will ever pray.

Your petitioners further show that their respective shares in the said prize money, under the act of Congress, remain their property respectively, and that no other persons are interested therein.

CHARLES ST. JOHN CHUBB,

Executor of the last will and testament of Lewis Warrington.

PHILIP F. VOORHEES.

JOHN PERCIVAL.

HERMAN THORN.

ELIZA HAMILTON,

Administratrix of the estate of C. B. Hamilton,

By ISAAC N. COFFIN.

DISTRICT OF COLUMBIA, }
Washington county, } ss.

Before me, a justice of the peace in and for said county, on this fifth day of May, 1856, personally appeared Isaac N. Coffin, agent of the above named petitioners, and made oath that the facts stated in the said petition are true to the best of his knowledge and belief.

B. K. MORSELL, *J. P.*

COURT OF CLAIMS.—No. 585.

Cases of the executor of Commodore Warrington and others, captors of the British sloop-of-war Epervier.

It is agreed that the record of the Prize court and the other public and official documents contained in the printed document of the House of Representatives, 30th Congress, 1st session, miscellaneous, No. 74, (a copy of which is hereto annexed,) may be read in evidence in these cases from the said printed document.

JAS. D. McPHERSON,

Deputy Solicitor.

BADGER & CARLISLE,

For Claimants.

Memorial of Lewis Warrington, captain in the United States navy, in behalf of himself and the officers and crew of the U. S. sloop-of-war Peacock, praying that one-half of the proceeds of the Epervier and goods, which went into the treasury by mistake, be restored to the officers and crew of said vessel, it having been decreed to them by the United States court as captors, April 26, 1848.

The memorial of the undersigned, a captain in the navy of the United States, in behalf of himself and of the officers and crew of the sloop-of-war Peacock at the time of the capture of the Epervier, most respectfully represents, that on the 29th of April, 1844, they captured, after a well-contested action, his Britannic Majesty's sloop-of-war Epervier, and conducted her, with her crew, into the port of Savannah. That she was there libelled, and decreed by the district court of the United States "as prize of war to the captors," the decree of the court being, as shown by a certified copy thereof from the records of that court, herewith filed, (being exhibit A,) at page 7 of said exhibit, as follows, viz: "It is ordered, adjudged, and decreed that the said sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, be condemned as prize of war *to the captors*, and sold after due notice by the marshal, and the proceeds be *distributed* as the law directs respecting captures made by the public armed vessels of the United States, after payment of costs and charges." The Epervier had on board certain specie, which was also decreed by said court (as shown by said exhibit A, at page 12,) as "prize of war *to the captors*, to be distributed." "The captors" were the undersigned and the other officers, and the crew. Notwithstanding this, Mr. John Epinger, the marshal, after selling the Epervier and receiving the proceeds, made the mistake of paying one-half thereof, and one-half of the specie captured in the Epervier, into the treasury of the United States; and the object of this memorial is to make a respectful application and demand that this their property be restored to them.

The law of the United States passed April 23, 1800, "directs respecting captures," as follows: "The proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, *be the sole property of the captors.*"

That the Epervier was of "equal force" to the Peacock, is shown as follows: The law of July 16, 1798, shows that the "*force of a vessel is the number of guns*," which law is as follows; "Be it enacted, &c., That the sum of six hundred thousand dollars shall be, and hereby is appropriated, to enable the President of the United States to cause to be built and equipped three ships or vessels, to be of a *force* not less than thirty-two *guns* each, and of the dimensions and model which he shall deem most advantageous," &c. That the Epervier was of equal force to the Peacock, is officially shown by the United States as follows: The Secretary of the Navy, in an official report to the Senate, dated March 14, 1814, transmits a table of the names, rates, &c., of the vessels of the United States navy, of which exhibit B is an extract, in which the force of the Peacock is shown to be

eighteen guns; and said Secretary in an official report to the Senate, dated October 3, 1814, transmits the official report of the commander of the Peacock of the capture of the Epervier, of which exhibit C is a copy, in which the Epervier is officially stated to be of the force of *eighteen* guns. Also, the official report of Lieut. John B. Nicholson, of her arrival (exhibit D) proves her to be of the force of *eighteen* guns. Thus the Peacock and Epervier being proved by United States *official* reports to be of "equal force," "the proceeds of the Epervier," and "the goods taken on board," were, in the language of said law, "the sole property of the captors;" and therefore the decree of the court as above mentioned, that the Epervier and specie was "prize of war to the captors," was in accordance with said law and said official reports of the Navy Department.

That the Navy Department considered the Epervier and goods as *decreed to the captors*, is shown by an official communication from it marked exhibit E, which is as follows; "Enclosed herewith is a copy of the opinion of the Attorney General of the United States on the claim of the marshal of Georgia, for a commission of one and a quarter per cent. on the amount of specie *decreed to the captors* of the sloop Epervier; by which opinion the claim appears to be inadmissible." This claim of the marshal was for $1\frac{1}{4}$ per cent., under the act of Congress of the 28th of February, 1799; and that the $1\frac{1}{4}$ per cent. was charged on the whole amount of specie captured, viz: \$117,903, is shown by the amount charged, viz: \$1,473 78, at page 13 of exhibit A, which amount is *just $1\frac{1}{4}$ per cent. on the whole*. As the commission charged by the marshal thus was on the *whole* specie captured, the Secretary of the Navy, in alluding in that letter to the commission of $1\frac{1}{4}$ per cent. on "the amount of specie decreed to the *captors* of the Epervier," certainly declares that the *whole* of the specie was decreed to the captors.

Three other official communications of the Navy Department demonstrate that it was the decision of that department that the captors possessed the sole interest in the Epervier, viz: one of June 11, 1814, (exhibit F,) states: "In respect to your prize, the Epervier, * * I am ready to negotiate with any agent, authorized *by the captors for the purchase of the Epervier*." This communication does not state for the half of the Epervier, but for *the Epervier*, thereby expressing the *whole* of the Epervier. The communication of June 16, 1814, (exhibit G,) states: "It is however, proper that the prize and her stores should be preserved in good order for *the benefit of the captors*;" thus stating, for the benefit of the *captors*, not for the benefit of the captors and the United States jointly. The letter of the Navy Department of July 24, 1814, (exhibit H,) states: "I regret that no agent for the captors has yet appeared to negotiate with this department for the sale of *the Epervier*." This letter does not state for the captors' half of the Epervier, but for "the Epervier," thereby expressing *the whole* of the Epervier.

Notwithstanding all these facts, the marshal, Mr. John Eppinger, (who was in the habit of making mistakes, as shown on the preceding page in relation to the commission,) after selling the Epervier and receiving the proceeds of the sale, made the mistake of paying one-half of the same, and one-half of the specie captured, into the Treasury

of the United States, as shown by the receipts of James Marshall, cashier, at page 13 of exhibit A, and as also shown by the official statement of said John Eppinger, marshal, dated August 12, 1814, (exhibit I;) and but for your memorialists being away at sea at the time, *contending for their COUNTRY'S rights, in neglect of their own*, they would have prevented this mistake.

That their title to it was a VESTED right—which, so far from being divested by the mistake of *the district marshal* in paying it into the treasury instead of to the captors, *could not be divested even by the extensive power of Congress itself*, with its act signed by the Executive, is shown by the solemn decision of the Attorney General, of October 17, 1820, in another prize case, at page 296 of published “Opinions of Attorneys General,” as follows: “In my opinion, Congress intended nothing more by this act than to substitute the \$255,000 in lieu of the proceeds of the sale of the prize vessels, had they been sold under the decree of court, without the most distant intention of affecting, in any manner, the mode of distribution, either as to the quantum or the persons authorized to take; indeed, they COULD NOT, IF THEY HAD INTENDED IT, have produced such an effect, because that would have been to DIVEST A VESTED RIGHT.”

By *compound* interest, the amount due your memorialists would have increased to thirteen times the original sum—which advantage the United States have had from the use of memorialists' property; but your memorialists pray for the restoration of the principal *only*. By the capture the memorialists furnished a valuable vessel, at a time when needed, to the government, and a considerable amount in specie when its credit was low, and they cannot believe that the nation, under *all these* circumstances, will withhold this *debt due* them.

The memorialists respectfully represent that these proceeds—thus, 1st, by law solemnly enacted to be “the *sole property* of the captors;” 2d, thus solemnly decreed by the court to be *their property*; 3d, thus shown by United States official reports and law to be a capture from an “equal,” and thus a *vested right* acquired by the captors to the whole; and, 4th, admitted by the Navy Department, in four official communications, to be *their property*—IS *their property*. They therefore memorialize your honorable body, and hereby make a respectful application that their property be restored to them, in accordance with the constitutional provision, “nor shall private property be taken for public use without just compensation.”

L. WARRINGTON,

For himself and the officers and crew of the United States sloop Peacock.

EXHIBIT A.

DISTRICT OF GEORGIA, *in the admiralty*.

To the honorable William Stephens, judge of the district court of the United States for the Georgia district.

The libel of Lewis Warrington, esq., commander of the United States sloop-of-war Peacock, on behalf as well of the United States, as

of himself and the officers and crew of the said United States sloop-of-war Peacock, against the British sloop-of-war Epervier, her tackle, apparel, and guns, and other implements of war.

The said libellant, for and on behalf as aforesaid, doth hereby propound, allege, and declare to this honorable court as follows, to wit:

First. That war and a state of hostilities exist between the United States of America and their Territories, and the United Kingdom of Great Britain and Ireland and the dependencies thereof, and captures and seizures of enemies's property authorized and enjoined on all officers of the United States; this libellant therefore, in and with the United States sloop-of-war Peacock, and her officers and crew, on the twenty-ninth day of April last past, did subdue, seize, and take upon the high seas the said British sloop-of-war Epervier, with her apparel, appurtenances, guns, and other implements of war, and have brought the said British sloop-of-war Epervier into the port of Savannah, and within the jurisdiction of this honorable court.

Secondly. That the said British sloop-of-war Epervier, at the time of the said capture thereof, was under the command of Richard Wales, esq., an officer in the service of his Britannic Majesty, and this libellant avers the British sloop-of-war Epervier, at the time of the said capture, was an armed British vessel, sailing under the flag of Great Britain, and navigated by subjects of Great Britain.

Lastly. This libellant doth allege, propound, and declare, that all and singular the premises are and were true, public, and notorious, and that by the law of the United States of America, as well as by the laws of nations, the said British sloop-of-war Epervier, with her tackle, apparel, guns, and other implements of war, became, and was, and is forfeited. And due proof being made, the libellant prays that the said British sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, may, by warrant under the seal of this court, be attached, and the usual process and monition of this court in this behalf be made; and all persons having or claiming any interest in the said British sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, or any part thereof, may be cited to appear at a special court of admiralty to be held at the court-house in the city of Savannah, in said district, on the twenty-eighth day of July instant, to answer the premises; and that right and justice may be duly administered in this behalf, and all due proceedings being had, that the said British sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, for the causes aforesaid and others appearing, may by the definitive sentence and decree of this honorable court be condemned as forfeited, to be distributed as by law is provided respecting the captures made by the public armed vessels of the United States.

C. HARRIS, *District Attorney.*

Libel filed July 14, 1814.

JNO. J. BULLOCH, *Clerk.*

Let the usual process and monition issue, returnable the 28th day of July, 1814.

W. STEPHENS.

UNITED STATES OF AMERICA, }
District of Georgia, } In the admiralty.

*The President of the United States to the marshal of said district,
greeting:*

Whereas a libel hath this day been filed in the admiralty court of the United States for said district, by Lewis Warrington, esq., commander of the United States sloop-of-war Peacock, in behalf as well of the United States as of himself and the officers and crew of the said United States sloop-of-war Peacock, against the British sloop-of-war Epervier, her tackle, apparel, and guns, and other implements of war:

That war and a state of hostilities exist between the United States of America and their Territories, and the United Kingdom of Great Britain and Ireland, and the dependencies thereof, and captures and seizures of enemies' property authorized and enjoined on all officers of the United States: That the libellant, therefore, in and with the United States sloop-of-war Peacock, and her officers and crew, on the twenty-ninth day of April last past, did subdue, seize, and take upon the high seas the said British sloop-of-war Epervier, with her apparel, appurtenances, guns, and other implements of war, and have brought the said British sloop-of-war Epervier into the port of Savannah, and within the jurisdiction of this honorable court.

That the said British sloop-of-war Epervier, at the time of the said capture thereof, was under the command of Richard Wales, esq., an officer in the service of his Britannic Majesty: That the said sloop-of-war Epervier, at the time of the said capture, was an armed British vessel, sailing under the flag of Great Britain, and navigated by subjects of Great Britain.

Now, therefore, you, the said marshal, are hereby commanded to arrest, detain, and take into your custody, possession, and safe keeping, the said British sloop-of-war Epervier, until the court shall make further order in the premises, and for your so doing this shall be your sufficient warrant.

Given under the seal of said court; and whatsoever you shall do in the premises certify and make known to the judge of said court, at Savannah, on the twenty-eighth day of July instant, and have then and there this writ. Witness the honorable William Stephens, judge of said court, this fifteenth day of July, in the year of our Lord eighteen hundred and fourteen.

CHARLES HARRIS,
District Attorney.

[L. S.] JOHN J. BULLOCH, *Clerk.*

MARSHAL'S OFFICE, *July 16, 1814.*

By virtue of the within warrant of arrest to me, I have caused to be arrested the British sloop-of-war Epervier, her tackle, apparel, guns, &c., as within commanded.

The return of—

JOHN EPPINGER, *M. D. G.*

UNITED STATES OF AMERICA, }
District of Georgia, } In the admiralty.

The President of the United States to the marshal of said district, greeting:

Whereas a libel hath this day been filed in the admiralty court of said district by Lewis Warrington, esq., commander of the United States sloop-of-war Peacock, stating that war and a state of hostilities exist between the United States of America and their Territories, and the United Kingdom of Great Britain and Ireland, and the dependencies thereof, and captures and seizures of enemies' property authorized and enjoined on all officers of the United States: That the libellant, therefore, in and with the United States sloop-of-war Peacock, her officers and crew, did, on the 29th day of April last past, subdue, seize, and take upon the high seas the British sloop-of-war Epervier, with her apparel, appurtenances, guns, and other implements of war, and has brought the said sloop-of-war Epervier into the port of Savannah, and within the jurisdiction of this honorable court.

Now, therefore, you, the said marshal, are hereby commanded to cite and admonish all and every person and persons having or claiming any interest in the British sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, or any part thereof, to appear at a special court of admiralty to be held at the court-house in the city of Savannah, in said district, on the twenty-eighth day of July instant, to answer the premises, and that right and justice may be duly administered in this behalf. And whatsoever you shall do in the premises, certify and make known to the judge of said court at the time and place aforesaid, and have then and there this writ. Witness the honorable William Stephens, judge of the district court of the United States for the district of Georgia, this fifteenth day of July, in the year eighteen hundred and fourteen.

C. HARRIS,
District Attorney.

[L. S.] JOHN J. BULLOCH, *Clerk.*

All persons interested in the foregoing monition will take due notice.
 JNO. EPPINGER, *Marshal.*

MARSHAL'S OFFICE, *Savannah, July 28, 1814.*

In obedience to the within monition, I have caused all persons concerned to be cited, to appear before your honor this day, as within commanded.

The return of—

JNO. EPPINGER, *M. D. G.*

At a special court of admiralty held at the court-house in Savannah, on Thursday, the 28th day of July, in the year of our Lord eighteen hundred and fourteen, before the honorable William Stephens:

LEWIS WARRINGTON, commander }
 U. S. sloop-of-war Peacock, } Libel as prize of war.
vs.
 BRITISH SLOOP-OF-WAR EPERVIER. }

Warrant and monition returned; deposition of William Chesson taken and reduced to writing. Proclamation made by the marshal, and this first default recorded by order of court.

LEWIS WARRINGTON, commander of the United }
 States sloop-of-war Peacock, in behalf, &c., } Libel as prize of war.
vs.
 BRITISH SLOOP-OF-WAR EPERVIER, &c. }

Personally appeared William Chesson, midshipman on board said sloop-of-war Epervier, who being duly sworn, saith that said sloop-of-war Epervier was captured by the sloop of-war Peacock, Lewis Warrington commander, on the twenty-ninth day of April last.

W. CHESSON.

Sworn to in open court this 28th April, 1814, before me.

JNO. J. BULLOCH, *Clerk.*

At a court of admiralty, held at the court-house in the city of Savannah, agreeably to adjournment, on Friday, 29th day of July, 1814, before the honorable William Stephens:

LEWIS WARRINGTON, commander of the United }
 States sloop-of-war Peacock, &c., } Libel as prize of war.
vs.
 BRITISH SLOOP-OF-WAR EPERVIER, &c. }

Proclamation made by the marshal, and this second default recorded by order of court.

At a court of admiralty, held at the court-house in the city of Savannah, agreeably to adjournment, on Monday the first day of August, 1814, before the honorable William Stephens:

LEWIS WARRINGTON, commander of the United }
 States sloop-of-war Peacock, &c., } Libel as prize of war.
vs.
 BRITISH SLOOP-OF-WAR EPERVIER, &c. }

Proclamation made by the marshal, and this third default recorded by order of court.

UNITED STATES VESSEL-OF-WAR PEACOCK, }
vs. } Libel as prize.
 BRITISH SLOOP-OF-WAR EPERVIER, &c. }

The United States vessel-of-war Peacock, commanded by Lewis Warrington, esq., captured his Britannic Majesty's sloop-of-war Epervier, and brought her into this port; she has been libelled by the

district attorney. The usual monition has been published, and proclamations made, and defaults duly recorded. No claimant appearing, it is ordered, adjudged, and decreed that the said sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, be condemned as prize of war, to the captors, and sold after due notice by the marshal, and the proceeds be distributed as the law directs respecting captures made by the public armed vessels of the United States, after payment of costs and charges.

W. STEPHENS.

AUGUST 1, 1814.

UNITED STATES,	}	Prize of war to the United States sloop Peacock.— <i>In admiralty.</i>
vs.		
BRITISH SLOOP-OF-WAR EPERVIER,		

Mr. L. Tilton, left in charge of the Epervier, by Captain Warrington, until a regular condemnation had taken place, and as a midshipman, entitled to a proportion of prize-money, as well of specie as the sales of Epervier, and withal having been very sick, and now ordered on to Washington by the Secretary of the Navy with the flags of the Epervier, it is ordered that the marshal pay Mr. Tilton one hundred and twenty dollars on account of prize money, he giving duplicate receipts on copies of this order.

W. STEPHENS,
District Judge.

To the MARSHAL of Georgia.

AUGUST 16, 1814.

The marshal will send a copy to the Secretary of the Navy.

DISTRICT OF GEORGIA, *in the admiralty:*

To the Hon. William Stephens, judge of the district court for the district aforesaid, having and holding admiralty jurisdiction:

Be it remembered, that on the seventeenth day of May, in the year of our Lord one thousand eight hundred and fourteen, comes into court Lewis Warrington, esq., commander of the United States (sloop-of-war) Peacock, on behalf as well of the said United States as of himself, the officers, and crew of the said United States sloop-of-war Peacock, by Charles Harris, United States attorney, who doth libel, propound, and allege, as follows:

1. That war exists between the United States of America and their Territories, and the United Kingdom of Great Britain and Ireland and the dependencies thereof, and captures and seizures of enemies' property authorized and enjoined on all public armed vessels of the United States.

2. That on the high seas, on the twenty-ninth day of April last past, the said United States sloop-of-war Peacock, her officers and crew, captured the British sloop-of-war Epervier, having on board one hundred and seventeen thousand nine hundred and three dollars, or

thereabouts, in boxes, which dollars this libellant avers was the property of the government of Great Britain, or of subjects of the said government, and enemies of the United States.

3. That the said one hundred and seventeen thousand nine hundred and three dollars, or thereabouts, in boxes, as aforesaid, being the property of the government of Great Britain, or of subjects of the said government, and liable to condemnation as prize of war, is now in the port of Savannah, and within the jurisdiction of this honorable court for legal inquiry.

This libellant, in behalf as aforesaid, doth aver that all and singular the premises are and were true, public, and notorious, and that due proof being made, he humbly prays that the said one hundred and seventeen thousand nine hundred and three dollars, or thereabouts, may by warrant, under the seal of this honorable court, be attached, and that the usual process and monition in this behalf be made, and that all persons concerned or interested in the said sum of money in gold and silver aforesaid, or any part thereof, may be cited to appear at a special court of admiralty to be held at the court-house, in the city of Savannah, in the district aforesaid, on the first day of June, to answer the premises; and that right and justice may be duly administered in this behalf, and all due proceedings being had, that the said sum of money in gold and silver may, by the definitive sentence and decree of this honorable court, be condemned as prize of war and forfeited, to be distributed as by law is provided in cases of captures made by the public armed vessels of the United States, and according to the course of proceeding in this honorable court.

C. HARRIS, *District Attorney.*

Let the usual monition issue, returnable the —.

UNITED STATES OF AMERICA, { *In the admiralty.*
District of Georgia.

The President of the United States to the marshal of said district, greeting:

Whereas a libel hath this day been filed in the admiralty court of the United States for the district aforesaid, by Lewis Warrington, esq., commander of the United States sloop-of-war Peacock, against one hundred and seventeen thousand nine hundred and three dollars, or thereabouts, in boxes, taken from on board the British sloop-of-war Epervier. Now, therefore, you, the said marshal, are hereby commanded to arrest, detain, and take into your custody, possession, and safekeeping, the said sum of one hundred and seventeen thousand nine hundred and three dollars until the court shall make further order in the premises; and for your so doing this shall be your sufficient warrant.

Given under the seal of said court; and whatsoever you shall do in the premises, certify and make known to the judge of said court at Savannah, on the first day of June next, and have then and there this writ.

Witness, the honorable William Stephens, judge of said court, this seventeenth day of May, in the year eighteen hundred and fourteen.

CHARLES HARRIS,
District Attorney.

[L. S.] JOHN J. BULLOCH, *Clerk.*

MARSHAL'S OFFICE, GEORGIA,
Savannah, May 24, 1814.

Served a copy of the within on James Marshall, cashier of the Planters' Bank, in person.

The return of

JOHN J. ROBERTS,
Deputy Marshal.

SAVANNAH, *May 26, 1814.*

By virtue of the within warrant to me directed, I have arrested the sum of \$117,903 09, as within commanded, and have the same in bank.

The return of

JOHN EPPINGER, *M. D. G.*

UNITED STATES OF AMERICA, }
District of Georgia } In the admiralty.

The President of the United States to the marshal of said district, greeting:

Whereas a libel hath this day been filed in the admiralty court of the United States for the district aforesaid, by Lewis Warrington, esq., commander of the United States sloop-of-war *Peacock*, on behalf as well of the said United States as of himself, the officers and crew of the said United States sloop-of-war *Peacock*, stating that war exists between the United States of America and their Territories and the United Kingdom of Great Britain and Ireland and the dependencies thereof, and captures and seizures of enemies' property authorized and enjoined on all public armed vessels of the United States; that on the high seas, on the twenty-ninth day of April last past, the said United States sloop-of-war *Peacock*, her officers and crew, captured the British sloop-of-war *Epervier*, having on board one hundred and seventeen thousand nine hundred and three dollars, or thereabouts, in boxes, which dollars this libellant avers were the property of the government of Great Britain, or of the subjects of said government, and enemies of the United States; that the same one hundred and seventeen thousand nine hundred and three dollars, or thereabouts, in boxes, as aforesaid, being the property of the government of Great Britain, or of subjects of the said government, and liable to condemnation as prize of war, is now in the port of Savannah and within the jurisdiction of this honorable court for legal inquiry: Now, therefore, you, the said marshal, are hereby commanded to cite and admonish all and every person and persons having or claiming any interest in the said one hundred and seventeen thousand nine hundred and three dollars, or any part thereof, to appear at a special court of admiralty to be held at the court-house in the city of Savannah, in the district aforesaid, on the first day of

June, to answer the premises, and that right and justice may be duly administered in this behalf. And whatsoever you shall do in the premises and in this behalf, certify and make known to the judge of said court at the time and place aforesaid, and have then and there this writ.

Witness, the honorable William Stephens, judge of the district court of the United States for the district of Georgia, this seventeenth day of May, in the year of our Lord one thousand eight hundred and fourteen.

CHARLES HARRIS,
District Attorney.

[L. s.] JOHN J. BULLOCH, *Clerk.*

All persons interested in the foregoing monition will take due notice
JOHN EPPINGER, *Marshal.*

Marshal's return.

MARSHAL'S OFFICE, *June 1, 1814.*

In obedience to the within monition I have caused all persons concerned to be cited to appear before your honor this day, by publishing the same in the Evening Ledger, and posting a copy at the court-house in Savannah.

The return of

JOHN EPPINGER, *M. D. G.*

Court met on the 10th of June, 1814, at the court-house in Savannah. Present, Hon. William Stephens, judge.

THE UNITED STATES VESSEL-OF-WAR PEACOCK	} Libel as prize.
<i>vs.</i>	
\$117,903 captured in the EPERVIER.	

The United States vessel-of-war Peacock, commanded by Lewis Warrington, esq., in the late capture of his Britannic Majesty's sloop-of-war Epervier, brought into this port, captured also, in dollars, one hundred and seventeen thousand nine hundred and three dollars, which has been libelled by the district attorney. The usual monition has been published, and proclamations made, and the defaults duly recorded. No claimant appearing, it is ordered, adjudged and decreed, that the said sum of one hundred and seventeen thousand nine hundred and three dollars be condemned as prize of war to the captors, to be distributed as the law directs on captures made by the public armed vessels of the United States, after payment of costs and charges.

W. STEPHENS,
District Judge, Georgia.

Ordered that a certified copy of the above be sent to the Secretary of the Navy, as also a copy of the demand of the marshal for his commissions, and that the same be forwarded by the attorney for the district.

W. STEPHENS.

JUNE 10, 1814.

*Marshal's Statement.*UNITED STATES, *District of Georgia.*LEWIS WARRINGTON, esq., commander of the }
United States sloop-of-war Peacock. }*vs.*
\$117,903 taken from on board the
BRITISH SLOOP-OF-WAR EPERVIER.} n the admiralty. Li-
} bel and condemnation
} as prize.

Amount arrested \$117,903 09

Charges.

Taxed costs.....	\$93 91	
Commission.....	1,473 78	
		1,567 69
Balance.....		116,335 40

Distribution.

One moiety to the captors.....	\$58,167 70	
One moiety to the United States, paid cashier of Planters' Bank.....	58,167 70	
		116,335 40

JOHN EPPINGER, *Marshal.*MARSHAL'S OFFICE, *August 18, 1814.*

Commission on \$117,903 09, charged and disallowed by government	\$1,473 78
---	------------

Distribution.

One moiety to the captors	\$736 89	
One moiety to the United States, paid to cashier of Planters' Bank.....	736 89	
		1,473 78

JOHN EPPINGER, *Marshal.*MARSHAL'S OFFICE, *August 18, 1814.*PLANTERS' BANK, *Savannah*, ——— 15, 181 .

Received of John Eppinger, esq., marshal of Georgia, fifty-eight thousand one hundred and sixty-seven dollars and seventy cents, on account of Thomas T. Tucker, esq., Treasurer of the United States, which sum is entered to his credit in the books of this bank, having signed quadruplicate receipts.

J. MARSHALL, *Cashier.*
By JAS. HUNTER, *Teller.*

PLANTERS' BANK, *Savannah, August 18, 1814.*

Received of John Eppinger, esq., marshal for the district of Georgia, seven hundred and thirty-six dollars and eighty-nine cents, on account of Thomas T. Tucker, esq., Treasurer of the United States, which sum is entered to his credit in the books of this bank, having signed quadruplicate receipts.

J. MARSHALL, *Cashier.*

L. WARRINGTON, commander of the UNITED STATES SLOOP PEACOCK.	}	In admiralty. Libel and con- demnation as prize.
<i>vs.</i>		
\$117,903 taken from on board the BRITISH SLOOP EPERVIER.		

Amount of moiety to captors.....	\$58,904 59
Deduct—	
Paid midshipman N. Tilton, per order of district judge.....	\$120 00
Postages, Hermon Thorn	50
	120 50
Balance.....	58,784 09

Received, Savannah, March 10, 1815, of John Eppinger, marshal, fifty-eight thousand seven hundred and eighty-four dollars and nine cents, in full of the balance due on the moiety to the captors, per statement above.

C. HARRIS,
Attorney for HERMON THORN,
of the sloop-of-war Peacock.

UNITED STATES,	}	In admiralty. Prize of war to United States sloop Peacock.
<i>vs.</i>		
BRITISH BRIG-OF-WAR EPERVIER.		

Mr. N. Tilton, left in charge of the Epervier by Captain Warrington, until a regular condemnation had taken place, and as a midshipman, entitled to a proportion of prize money, as well of specie as the sales of Epervier, and withal having been very sick, and now ordered on to Washington by the Secretary of the Navy with the flags of the Epervier:

It is ordered that the marshal pay Mr. Tilton one hundred and twenty dollars on account of prize money, he giving duplicate receipts, on copies of this order.

W. STEPHENS,
District Judge, Georgia.

To the MARSHAL OF GEORGIA, *August 16, 1814.*

Received, Savannah, August 16, 1814, of John Eppinger, marshal of Georgia, one hundred twenty dollars, on account of my proportion of prize money on the moiety of the net proceeds of sale of the prize sloop-of-war Epervier, and specie, decreed to the captors.

N. TILTON,
Midshipman United States Navy.

DISTRICT OF COLUMBIA, *Washington county*:

Whereas I am fully authorized by the annexed power, jointly and severally with Lyttleton W. Tazewell, to transact all business relative to the interests of the officers and crew of the United States sloop-of-war Peacock in the prize brig the Epervier, and particularly to hold the proceeds to which the said officers and crew may be entitled in the said prize vessel: Now, by virtue of said power and authority so vested, I do hereby nominate and appoint Charles Harris, esq., attorney for the district of Georgia, my lawful substitute and procurator, to demand of, and to receive from John Eppinger, esq., marshal for the district aforesaid, the amount of prize money now in his custody belonging to said officers and crew, and to execute an acquittance or receipt therefor, and to do and perform every act, on the payment over to him of said money, which I might do by virtue of the said delegation of power if personally present, and to hold the said prize money subject to my order. And I do hereby, for and on behalf of said officers and crew, ratify and confirm every and all the acts of my said procurator in the premises.

Given under my hand and seal at Washington city, this 24th day of February, 1815.

HERMON THORN. [L. s.]

Signed and sealed in the presence of

D. RANDALL,
ALEXANDER KERR.

DISTRICT OF COLUMBIA, *Washington county*, ss:

Be it known that on the twenty-fourth day of February, in the year eighteen hundred and fifteen, personally appeared before me, a notary public for the county of Washington, in the District of Columbia, duly commissioned and qualified, Hermon Thorn, who acknowledged the above power, to which his name is affixed, to be his act and deed.

In testimony whereof, I have hereunto set my hand and affixed my [L. s.] notarial seal, the day and year above written.

ALEXANDER KERR,
Notary Public.

Then follows the power of attorney from the officers and crew of the sloop-of-war Peacock to Hermon Thorn and Lyttleton W. Tazewell, which is a voluminous document, and can be furnished if required.

GEORGE GLEN, *Clerk.*

UNITED STATES OF AMERICA, *District of Georgia, ss:*

I, George Glen, clerk of the district court of the United States for the district of Georgia, do hereby certify that the preceding and annexed writing is a true and perfect transcript of the record and proceedings remaining in said court in the cause therein mentioned, taken from and by me carefully compared with the originals filed and being of record in my office.

In witness whereof, I have hereto set my hand and affixed the
[L. s.] seal of the said district court, this twenty-ninth day of December, in the year of our Lord one thousand eight hundred and forty-five.

GEORGE GLEN, *Clerk.*

UNITED STATES OF AMERICA, *District of Georgia, ss:*

I, John C. Nicoll, judge of the district court of the United States for the district of Georgia, do hereby certify that George Glen, who signed the within certificate, is, and was at the time of signing the same, the clerk of the district and circuit courts of the United States for the district of Georgia; that full faith and credit ought to be given to his acts and attestations as such, and that his said certificate and authentication of the foregoing transcript is in due form.

In witness whereof, I have hereto set my hand this twenty-ninth day of December, in the year of our Lord 1845.

JOHN C. NICOLL, *District Judge.*

EXHIBIT B.

NAVY DEPARTMENT, *March 4, 1814.*

SIR: Agreeably to your intimation, I have the honor to transmit herewith a list of ships and vessels of the navy of the United States, with the rate, station, and name of the commander of each.

I am, very respectfully, your obedient servant,

W. JONES.

The Hon. JOHN GAILLARD,
Chairman of the Naval Committee, Senate.

Extract from the list above mentioned

Name.	Rate.	Station.	Commander.
Constellation -----	36	Norfolk, under sailing orders ----	Charles Gordon -----
Peacock -----	18	New York, under sailing orders --	Lewis Warrington ---
Enterprise -----	14	Cruising -----	James Renshaw -----

A true extract from the record.

Attest:

JOHN APPLETON,
Chief Clerk Navy Department.

DECEMBER 21, 1846.

EXHIBIT C.

NAVY DEPARTMENT,
October 3, 1814.

SIR: Agreeably to your request, I have the honor to enclose the official account and other papers relating to the capture of the enemy's sloop-of-war Epervier, on the 29th of April last, by the United States sloop-of-war Peacock, commanded by Captain Warrington.

If the relative force and comparative effect of the fire of the combatants, and the speedy termination of the contest, though protracted by the early loss of the Peacock's fore-yard, be taken as the criterion, then does it display a steady valor and superior skill on the part of the commander, officers, and crew of the Peacock, which may fairly challenge any single action on record.

I have the honor to be, very respectfully, sir, your obedient servant,
W. JONES.

The Hon. CHARLES TAIT,
Chairman of the Naval Committee, Senate.

UNITED STATES SLOOP PEACOCK,
At sea, lat. 27° 47', long. 80° 9', April 29, 1814.

SIR: I have the honor to inform you that we have this morning captured, after an action of forty-two minutes, his Majesty's brig Epervier, rating and mounting eighteen thirty-two pound carronades, with one hundred and twenty-eight men, of whom eight were killed and fifteen wounded, (according to the best information we could obtain) Among the latter is her first lieutenant, who has lost an arm and received a severe splinter wound on the hip. Not a man in the Peacock was killed, and only two wounded—neither dangerously so.

The fate of the Epervier would have been determined in much less time but for the circumstance of our fore-yard being totally disabled by two round shot in the starboard quarter from her first broadside, which entirely deprived us of the use of our fore and foretopsails, and compelled us to keep the ship large throughout the remainder of the action. This, with a few topmast and topgallant backstays cut away, and a few shot through our sails, is the only injury the Peacock has sustained. Not a round shot touched our hull; our masts and spars are as sound as ever. When the enemy struck he had five feet of water in his hold, his maintopmast was over the side, his main boom shot away, his foremast cut nearly in two and tottering, his fore-rigging and stays shot away, his bowsprit badly wounded, and forty-five shot holes in his hull, twenty of which were within a foot of his water-line, above and below. By great exertions we got her in sailing order just as dark came on.

In fifteen minutes after the enemy struck the Peacock was ready for another action in every respect but her fore-yard, which was sent down, fixed, and had the foresail set again in forty-five minutes; such was the spirit and activity of our gallant crew.

The Epervier had under her convoy an English hermaphrodite brig, a Russian and a Spanish ship, which all hauled their wind and stood to the E.NE. I had determined upon pursuing the former, but found that it would not answer to leave our prize in her then crippled state; and the more particularly so as we found she had one hundred and twenty thousand dollars in specie, which we soon transferred to this sloop. Every officer, seaman, and marine, did his duty, which is the highest compliment I can pay them.

I am, respectfully,

L. WARRINGTON.

The foregoing are truly copied from the files of the Navy Department.

JOHN APPLETON,
Chief Clerk.

DECEMBER 21, 1846.

EXHIBIT D.

SAVANNAH, GA., *May 1, 1814.*

SIR: I have the honor of informing you of my arrival here in late his Britannic Majesty's brig Epervier, of eighteen thirty-two pound carronades, Captain Wales, captured by the sloop Peacock on Friday morning, the 29th, off cape Carneveral, after an action of forty-five minutes, in which time she was much cut up in hull, spars, rigging, and sails, with upwards of five feet of water in her hold, having the advantage of the weather-gauge. She lost eight killed and fifteen wounded, among the latter her first lieutenant, who has lost his arm. I am happy to say the Peacock received no material injury—her foreyard and *two* men slightly wounded. She received not one shot in her hull. The brig had upwards of \$100,000 on board.

I have the honor to be, respectfully, your obedient servant,

JOHN B. NICOLSON.

Hon. WILLIAM JONES.

NAVY DEPARTMENT, *December 23, 1846.*

A true copy. Attest:

JOHN APPLETON,
Chief Clerk.

EXHIBIT E.

NAVY DEPARTMENT, *July 28, 1814.*

SIR: Enclosed herewith is a copy of the opinion of the Attorney General of the United States on the claim of a marshal of Georgia for a commission of one and a quarter per cent. on the amount of specie decreed to the captors of the sloop Epervier, by which opinion the claim appears to be inadmissible.

I have the honor to be, very respectfully, your obedient servant,
W. JONES.

CHARLES HARRIS, Esq.,
District Attorney, Savannah, Georgia.

NAVY DEPARTMENT, *December 12, 1846.*

A true copy of record. Attest:

JOHN APPLETON,
Chief Clerk Navy Department.

EXHIBIT F.

NAVY DEPARTMENT, *June 11, 1814.*

SIR: * * * * *

In respect to your prize, the Epervier, the department is disposed, after she shall have gone through the regular ordeal of the district court, to purchase her for the public service at her fair and full value ; for which purpose I am ready to negotiate with any agent authorized by the captors, for the purchase of the Epervier, together with all her armament, equipment, and stores of what kind soever, including every thing captured on board and belonging to the vessel. Whatever, therefore, may have been taken out of the prize, either for the use of the Adams or of the Peacock, will of course be included, and will thus supersede the necessity of a distinct valuation of those articles. It will, however, be desirable that as little should be taken out of the prize as possible, as it will be difficult to replace the articles on that remote and unprovided station.

The department is not disposed to become a competitor at a public sale, as there can be no real private bidders, and it will be better that the court should authorize either a public sale or a private one, by the agent of the captors, to the government of the United States.

* * * * *

I am, respectfully, &c.,

W. JONES.

LEWIS WARRINGTON, Esq.,

*Commanding United States ship Peacock, Savannah.*NAVY DEPARTMENT, *December 14, 1846.*

The foregoing is a true extract from the records of this department.

JOHN APPLETON,
Chief Clerk.

EXHIBIT G.

NAVY DEPARTMENT, *June 16, 1814.*

SIR: Your letter of the 6th instant is received. The Navy Department has no interest in or charge of prize vessels captured by ships of the United States until after condemnation in the admiralty court, and then only where the department becomes the purchaser, either at public sale or by agreement with the captors ; and until that point is decided, I can give no instructions respecting the Epervier.

It is however proper that the prize and her stores should be preserved in good order for the benefit of her captors. Lieut. Walpole, however, will lend you any necessary assistance in men, and I presume Captain Warrington has left an agent to represent the interest of the captors, and to whom you will apply for whatever may be required.

I am, respectfully, &c.,

W. JONES.

Midshipman N. TILTON,
U. S. Navy, Savannah, Georgia.

DECEMBER 14, 1846.

A true copy of record.

JOHN APPLETON,
Chief Clerk Navy Department.

EXHIBIT H.

NAVY DEPARTMENT, *July 24, 1814.*

SIR: I have this moment received a letter from C. Harris, esq., attorney for the district of Georgia, saying, "I proceeded immediately to libel the *Epervier*, and shall obtain a final condemnation in the beginning of August, and an early sale will take place unless you wish it or order it postponed. I suppose you will order her to be purchased, as she cannot bring anything like her value."

I regret that no agent for the captors has yet appeared to negotiate with this department for the sale of the *Epervier* at an equitable and liberal price, which I am disposed to give, and which, by agreement of the parties, the court would have sanctioned. There appears, however, no alternative but a public sale, at which there will be no real bidders but the public at anything like her value, and justice to the captors forbids that she should be sacrificed. I have therefore determined upon the highest price which I feel myself authorized to go in the purchase of the *Epervier* for the service of the navy of the United States. You are therefore hereby authorized to purchase the *Epervier* at public sale, at a sum not exceeding fifty-five thousand dollars, including in the purchase all her armament, ammunition, provisions, stores of all kinds in every department, iron and other ballast, equipments and appurtenances of every description which belonged or was attached to the said vessel at the time of her capture, and free from all charge against said vessel to the day of the sale, and also of the costs of condemnation and court charges. On this subject you will have a clear understanding with the district attorney and the marshal, and recite the foregoing conditions in the bill of sale from the marshal.

I am respectfully, &c.

W. JONES.

A. S. BULLOCH,
Navy Agent, Savannah.

A copy of record.—Attest:

JOHN APPLETON,
Chief Clerk Navy Department.

EXHIBIT I.

Extract from "American State Papers," (volume of Naval Affairs,) page 426.

UNITED STATES, *District of Georgia:*

Marshal's sale on the 11th August, 1814, at Savannah.

LEWIS WARRINGTON, esq., commander of the United States sloop-of-war Peacock, <i>vs.</i> THE BRITISH SLOOP-OF-WAR EPERVIER.	}	In the admiralty. Li- belled and condemned as a prize.
---	---	--

Amount of sale of the Epervier, her tackle, &c., to the Navy Department.....	\$55,000 00
---	-------------

Charges.

Advertising	\$2 25	
Taxed costs of court.....	76 71	
Custody fees.....	64 00	
Irvine—negro hire, lighterage, &c.....	95 50	
Bulloch—drayage, pilotage, &c.....	305 45	
Hunter, Mimis, and Henry—storage, &c.....	143 50	
Green, harbor master.....	9 35	
Woodbridge, landing and shipping guns.....	17 00	
Commission	693 75	
	1,407 50	
		53,592 50

Distribution.

One moiety to the captors.....	\$26,796 25
One moiety to the United States.....	26,796 25
	53,592 50

JNO. EPPINGER, *Marshal.*

MARSHAL'S OFFICE,
Savannah, August 12, 1814.

Extract from a statement to the Navy Department, by the Fourth Auditor of the Treasury, of prize money received by the United States, entitled "Statement of the proceeds of prizes received from and after the 20th of June, 1812," dated September 16, 1818. Extracted from State Papers, (Naval Affairs,) page 556.

Name of prizes.	Captured by	Where con- demned.	Paid over by.	When paid.	Amount paid.
• • •	• •	• •	• •	• • •	• •
Ship Epervier--	Ship Peacock	Georgia --	J. Eppinger -	August 14, 1814-	\$26,796 25

EXHIBIT K.

Extract from the decree of the district court of the United States for the district of New York, in the case of

“THE UNITED STATES OF AMERICA, and the officers and crew of the United States frigate United States, *vs.* THE FRIGATE MACEDONIAN, her tackle, apparel and furniture, arms, stores, and ammunition,” extracted from State Papers, (Naval Affairs,) page 425; [showing that this decree is in almost the exact language of the decree of condemnation in the case of the Epervier and the *whole* amount of the proceeds of the Macedonian was paid to the captors, therefore as this decree decreed the proceeds of the Macedonian to the captors equally so did the decree in the case of the Epervier decree the proceeds to her captors, and *not* to the captors and the United States jointly; otherwise each would have been mentioned as in the decree on the following page, in the case of the Constitution *vs.* the Cyane:]

“The court doth pronounce, decree, and declare that the said frigate or ship Macedonian, her tackle, apparel and furniture, and the arms, stores, and ammunition taken on board of the same, be adjudged and condemned as good and lawful prize to the commander, officers and crew of the said United States ship-of-war United States, the captors thereof.”

In the case, however, of the Cyane, a ship of *inferior* force, captured by the United States ship Constitution, the decree of the court decrees the Cyane to be the property of the *United States* and the captors, as the following decree will show; and as in the case of the Epervier, the decree decrees the property *not* to the *United States* and the captors, as in the case of the Cyane, but to the captors, the decree of the Epervier decrees the whole to the captors.

“THE UNITED STATES OF AMERICA, and the officers and crew of the United States frigate Constitution, *vs.* THE SHIP CYANE, her armament, tackle, apparel and furniture, and stores.”—(From State Papers, “Naval Affairs,” page 418.)

“It is ordered, sentenced, and decreed by the court, that the said ship Cyane, her armament, tackle, apparel and furniture, and stores, be and the same are hereby condemned as good and lawful prize to the *United States* and the captors aforesaid: and it is further ordered that the said ship Cyane, her armament, tackle, apparel and furniture, and stores, be sold by the marshal according to law.”

EXHIBIT L.

Extracts from decisions of the United States courts, showing that to whomsoever prize property is condemned, it vests the right to such property or its proceeds, in such persons or corporation. If condemned to the captors, then the decree vests it in the captors; if condemned to the United States, then the decree vests it in the United States.

“If the national character of captured property appears doubtful, or even neutral, and no claim is interposed, the court will delay the

final decree for a reasonable time ; which time has, by the general usage of nations, been fixed to a year and a day after the institution of the prize proceedings ; and if no claim is made within that time, the property is deemed abandoned, and is *condemned to the captors*, for contumacy and default of the supposed owners."—(The Harrison, 1 Wheaton, 298.)

"But if the capture be made by a non-commissioned captor, the prize will be *condemned to the United States*."—(3 Peters' Digest, page 367. The Pizarro, 2 Wheat.; 4 Cond. Rep., 103.)

"Property forfeited under a municipal law, but taken trading with the enemy, was *condemned to the captors*, not to the United States." (3 Peters' Digest, page 376. The Rapid, 1 Gallis. C. C. R., 295. The St. Lawrence, *ibid*, 472.)

"The vessel and cargo were *condemned as prize to the captors*."—(3 Peters' Digest, page 377. The Alexander, 8 Cranch, 169 ; 3 Cond. Rep., 72.)

"If captured on the high seas by a commissioned vessel, the property may be *condemned to the captors* as enemy's property ; if captured by an uncommissioned ship, the capture is still valid, and the property must be *condemned to the United States*."—(3 Peters' Digest, page 378. The Caledonian, 4 Wheat., 100 ; 4 Cond. Rep., 401.)

These repeated judicial decisions prove, beyond all doubt, that when the courts of the United States use the words "the captors," they mean the officers and crew of a ship of-war, and not the United States.

EXHIBIT M.

Communication of the Navy Department to the chairman of the Committee on Naval Affairs, in the case of the Guerrier, showing that the usage of the Navy Department is to consider the number of guns of each vessel as the criterion which decides the captured vessel to be of equal or superior force to the vessel making the capture.

[From State Papers, "Naval Affairs," page 275, communicated to the House of Representatives, November 25, 1812.]

NAVY DEPARTMENT, November 21, 1812.

SIR: In order to enable the committee to form a satisfactory opinion as to the compensation to be provided for the officers and crew of the frigate Constitution, for the capture and subsequent destruction of the British frigate, the Guerrier, I have the honor to state to you that the Constitution rated 44 and mounted 55 guns ; that the Guerrier rated 38 and mounted 54 guns. The Guerrier, although entirely dismantled, &c., * * * * *

I am, respectfully, &c.,

PAUL HAMILTON.

Hon. B. BASSETT.

EXHIBIT N.

RESOLUTION expressive of the sense of Congress relative to the victory of the Peacock over the Epervier.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be requested to present to Captain Lewis Warrington, of the sloop-of-war Peacock, a gold medal, with suitable emblems and devices; and a silver medal, with like emblems and devices, to each of the commissioned officers, and a sword to each of the midshipmen and to the sailing master, of the said vessel, in testimony of the high sense entertained by Congress of the gallantry and good conduct of the officers and crew in the action with the British brig Epervier, on the twenty-ninth day of April, in the year one thousand eight hundred and fourteen, in which action the decisive effect and great superiority of the American gunnery were so signally displayed.

Approved October 21, 1814.

NAVY DEPARTMENT, *May 7, 1857.*

SIR: In reply to your letter of the 30th ultimo, desiring information touching the comparative tonnage or size of the British sloop Epervier and United States ship Peacock, weight of metal, and strength of the crews at the time of the capture of the former by the latter named vessel, I have to state that it appears that the Epervier was a brig of 18 guns, 16 32-pounders and 2 18-pound carronades, and had a crew of 128 men. The Peacock was a ship of 22 guns, 2 long 12s and 20 32 pound carronades, and had a crew of 160 men.

So far as the department is aware, the above are all the facts in the points referred to shown by its records.

Very respectfully, your obedient servant,

I. TOUCEY.

JOHN D. MCPHERSON, Esq.,

Deputy Solicitor of the Court of Claims, Washington, D. C.

NAVY DEPARTMENT, *January 12, 1859.*

SIR: Your letter of the 6th instant has been received. You are informed, in reply, that all the "32-pounders" on the Epervier were carronades, but the "long 12s" on the Peacock were not.

I am, respectfully, your obedient servant,

ISAAC TOUCEY.

JOHN D. MCPHERSON, Esq.,

Deputy Solicitor of the Court of Claims.

IN THE COURT OF CLAIMS.—No. 585.

L. WARRINGTON'S REPRESENTATIVES ET AL. *vs.* THE UNITED STATES.*Brief of United States Solicitor.*

In April, 1814, the British sloop-of-war *Epervier* was captured by the United States ship *Peacock*. The *Epervier* was sent into Savannah, Georgia, condemned as prize of war, and sold by the marshal, who paid half the proceeds into the treasury and distributed the remaining half among the officers and crew of the *Peacock*. He made the same disposition of the specie found on board the *Epervier*, amounting to nearly \$120,000.

The petitioners allege that the marshal erred in paying any portion of the money to the United States; that the two vessels were of equal force, which fact, under the act of April 23, 1800, entitles the captors to the entire proceeds of the captured vessel and goods on board; and that, moreover, the vessel and money were condemned to the captors by the decree of the district court condemning the same.

The evidence in this case consists of the proceedings of the district court and official documents connected with the transaction at the time.

I. *As to the alleged equality of force.*

It is admitted that the *Peacock* and *Epervier* were both rated as vessels of 16 guns, the guns being 32-pounders, and that the *Peacock* was borne on the Navy Register as a 16-gun ship.

It is, however, stated in a letter from Mr. Toucey, Secretary of the Navy, dated May 7, 1857, that both vessels at the time of the capture carried more guns than they were rated at—the *Epervier* having 18 and the *Peacock* 22. The crew of the *Epervier* numbered 128 men; that of the *Peacock* 160 men.

The petitioners argue that the guns were the measure of force, citing the act of July 16, 1798. This may be admitted, but the act does not determine whether the guns which measure the force are the guns for which the vessel is rated or the guns which she actually carries. If the direction contained in the act to build vessels “of a force not less than 32 guns each” would not be satisfied unless by piercing the ship for 32 guns and mounting them on the gun deck, in addition to any guns that might be mounted on the spar deck, then the position would be sustained; but no authority for such a construction of the act is shown.

It is admitted that in the several cases cited for petitioners the officers and crews of the United States vessels received the entire proceeds of the British vessels captured by them, although the latter at the time of the capture carried fewer guns than the former. It is also admitted that the district court, in condemning the *Macedonian*, declared she was of equal force with the United States, whereas, in fact, the United States carried most guns. But the disparity in guns does not appear on the record. We know not on what evidence as to force the court proceeded.

II. *As to the operation of the decree.*

1st. The decree condemns the *Epervier* as prize of war to the captors. It is admitted that this form of decree in the British prize courts carries the property in the vessel to the officers and men who made the capture.

But we contend that this operation is due to the terms of the British prize act, which gives the captured vessel itself to the captors and reserves no part whatever to the crown.—(Lord Camden *vs.* Home, 2 H. B., 533, and Statute in 1 H. B., 197.) Whereas, our prize act disposes of “the proceeds” only, not of the vessel. The right of the prize being in the United States, can be disposed of only by law, and the decree of the court could not carry the property in the vessel of the captors. Prize is a technical term to express a legal capture, (Ship Resolution, 2 Dall., 1,) and under the provisions of our prize act the decree must therefore be understood to declare the vessel a legal capture.

2d. But the effective part of the decree is that which directs the sale of the vessel and the distribution of the proceeds “as the law directs respecting captures made by public armed vessels of the United States.” It is argued by petitioners’ counsel that this distribution must be confined to those to whom the vessel was condemned; and, again, that the word “distribution” does not properly apply to a division of equal moieties between two parties. We answer that distribution is a word of general signification, comprehending any rate of apportionment whatever, as in distribution by executors, &c. Nor is distribution confined to those to whom the vessel is condemned, for the vessel may be [and the court said should be] condemned to the United States, while the proceeds are to be distributed.—(Dos Hermanos, 2 Wh., 76.)

We contend that the decree makes the act of Congress the rule of distribution, and does not qualify it in any respect. The question of distribution does not arise before condemnation. The conflicting claims of persons entitled to share should be settled after condemnation.—(The *Amiable Isabella*, 6 Wh., 1.)

III. *As to proceedings after the decree.*

But the United States may claim under the decree itself. We admit that the term “captors” in the act directing distribution includes only officers and men of the capturing vessels. But this construction may be due to the context, not the force of the term itself, and a different sense is attached to it by writers on admiralty law, (Note to 2 Wh. Sup. Ct. Reports, p. 427 and *passim*,) and by the courts. Captures by privateers are generally, if not always, condemned to the captors, which, of course, must include the owners. The brig *Ernstern*, 2 Dall., 34; Brig *Gloucester*, 2 Dall., 37; The *Rapid*, 8 Cranch, 155; The *Alexander*, *id.*, 169; The *Sally*, *id.*, 382, afford examples of this, and in the case of the *Gloucester* the court said that under the form of privateers’ commissions the ship

and crew were captors. "The ship is figuratively considered as an agent, and represents the owners." And again: "The ship, captain, officers, and crew were joint tenants of the right to capture and make prizes conceded by the commission." The same reasoning applies to national vessels. Their commission is by law. The right to capture is in the ship, not in the officers commanding or in the crew. Captures made by crews, &c., of a national vessel, on board a vessel not belonging to the navy, are deemed to be made by non-commissioned captors.—(Dos Hermanos, 2 Wheaton, 98, and note, p. 505, citing 5 Rob., 51; id., 280; 4 Rob., 282, note *a*.)

Or if the United States could not claim as captor under the decree, it was perfectly competent for it to contest the right of the captors after condemnation and before distribution. In the *Amiable Isabella*, 6 Wh., 1, the court said this could be done after condemnation, and before decree of distribution. Both condemnation and distribution were by the same decree in the case at bar, but the opinion of the court in *Andrew vs. Wall* (3 How., 568) seems to extend this right to the time of actual distribution, and (p. 573) refers to the exercise of it as familiar practice in prize cases.

IV. *As to payment by the marshal.*

The marshal before making distribution should, for his own safety, have procured an order from the court, (*Brig Gloucester*, 2 Dall., 37,) and it is moreover the duty of the court to ascertain the persons entitled to a share of the proceeds.—(*The St. Lawrence and Cargo*, 2 Gallis., 20.) If, then, the other captors meant to contest the right of the United States to receive a moiety of the proceeds, they should have raised the objection before distribution, when the question could have been adjudicated by the proper tribunal. By acquiescence in the proceedings of the marshal, and especially by receiving their portion without objection, they have lost the right to recover against him, (*Schooner Collector*, 6 Wheat., 194,) and unless they could recover against the marshal no action will lie against the United States, who are contesting claimants, and between whom and the petitioners there is no privity of contract.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

CHARLES ST. JOHN CHUBB, EXECUTOR, AND OTHERS, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The petition states that on the 29th of April, 1814, the officers and crew of the United States sloop-of-war *Peacock* captured the British sloop-of-war *Epervier*, and conducted her into the port of Savannah; that she was there libelled, and decreed by the district court of the

United States as prize of war to the captors, (see Exhibit A;) that the Epervier had on board certain specie, which was also decreed by said court as prize of war to the captors to be distributed, (see Exhibit A;) that the captors were the persons mentioned above, and the other officers and the crew; that the marshal, John Eppinger, after selling the Epervier and receiving the proceeds, made the mistake of paying one-half thereof, and one-half of the specie captured in the Epervier, into the treasury of the United States. The prayer of the petition is that this, their property, be restored to them.

The evidence is substantially as follows:

The record of the two suits mentioned in the petition as Exhibit A. This record shows the libel against the Epervier, her tackle, apparel, guns, and other implements of war; the warrant of arrest, and its return served; the monition, and its return served. It also shows proof of the capture of the Epervier by the Peacock, as alleged in the petition; three separate defaults, and the following decree rendered on the 1st of August, 1814, viz:

“The United States vessel-of-war Peacock, commanded by Lewis Warrington, esq., captured his Britannic Majesty’s ship-of-war Epervier, and brought her into this port; she has been libelled by the district attorney. The usual monition has been published, and proclamation made, and defaults duly recorded. No claimant appearing, it is ordered, adjudged, and decreed, that the said sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, be condemned as prize of war to the captors, and sold after due notice by the marshal, and the proceeds be distributed, as the law directs respecting captures made by the public armed vessels of the United States, after payment of costs and charges.”

The record aforesaid also shows a libel against the specie mentioned in the petition, viz: \$117,903; the warrant of arrest, and its return served; the monition, and its return served; and the following decree rendered on the 10th of June, 1814, viz:

“The United States vessel-of-war Peacock, commanded by Lewis Warrington, esq., in the late capture of his Britannic Majesty’s sloop-of-war Epervier, brought to this port, captured also in dollars, one hundred and seventeen thousand nine hundred and three dollars, which has been libelled by the district attorney. The usual monition has been published, and proclamations made, and the defaults duly recorded. No claimant appearing, it is ordered, adjudged, and decreed, that the said sum of \$117,903 be condemned as prize of war to the captors, to be distributed as the law directs on captures made by the public armed vessels of the United States, after payment of costs and charges.”

It also appears that the marshal paid (costs deducted) one-half of said specie, namely, \$58,904 59 into the Planter’s Bank, at Savannah, on account of the Treasurer of the United States; the last part of the payment being made August 18, 1814.

It appears, by a letter of the Secretary of the Navy, (Exhibit B,) dated March 4, 1814, that the Peacock rated 18 guns.

According to Captain Warrington’s official account of the capture,

dated April 29, 1814, (Exhibit C,) the *Epervier* mounted 18 thirty-two pound carronades, and had 128 men.

Lieutenant Nicholson, on May 1, 1814, (Exhibit D,) informs the Secretary of the Navy of his arrival at Savannah, in the *Epervier*, "of 18 thirty-two pound carronades."

Exhibit E is a letter from the Secretary of the Navy to the district attorney at Savannah, enclosing an opinion of the Attorney General relative to the marshal's claim of a commission on the specie decreed to the captors of the *Epervier*.

Exhibit F is a letter from the Secretary of the Navy to Lewis Warrington, dated June 11, 1814, in which he says: "In respect to your prize, the *Epervier*, the department is disposed, after she shall have gone through the regular ordeal of the district court, to purchase her for the public service at her fair and full value."

Exhibit G is a letter from the Secretary of the Navy to the navy agent, Savannah, dated June 15, 1814, which, after saying that the department has no charge of prize vessels until purchased by it, says: "It is, however, proper that the prize and her stores should be preserved in good order for the benefit of the captors. Lieutenant Walpole, however, will send you any necessary assistance in men, and I presume Captain Warrington has left an agent to represent the interest of the captors, and to whom you will apply for whatever may be required."

Exhibit H is a letter from the Secretary of the Navy to the navy agent, Savannah. The Secretary here says: "I regret that no agent for the captors has yet appeared to negotiate with this department for the sale of the *Epervier* at an equitable and liberal price, which I am disposed to give, and which, by agreement of the parties, the court would have sanctioned. There appears, however, no alternative but a public sale, at which there will be no real bidder but the public at anything like her value; and justice to the captors forbids that she should be sacrificed. I have, therefore, determined upon the highest price which I feel myself authorized to go in the purchase of the *Epervier* for the service of the United States. You are therefore hereby authorized to purchase the *Epervier* at public sale, at a sum not exceeding \$55,000, including in the purchase all her armament," &c.

Exhibit I is the marshal's account of the sale of the *Epervier*, her tackle, &c., to the United States for \$55,000; of which sum the marshal paid into the treasury of the United States \$26,796 25, being one-half of the net proceeds of the sale.

Exhibit K gives copies of decrees in the cases of *The United States of America and the officers and crew of the United States vs. The Frigate Macedonian*, her tackle, apparel, and furniture, arms, stores, and ammunition; and of *The United States of America and the officers and crew of the United States frigate Constitution vs. The Ship Cyane*, her armament, tackle, apparel, furniture, and stores.—(State Papers, Naval Affairs, 418.)

Exhibit L contains a reference to authorities.

Exhibit M is the following letter from the Navy Department to the chairman of the Committee on Naval Affairs of the 21st November, 1812:

"SIR: In order to enable the committee to form a satisfactory opinion as to the compensation to be provided for the officers and crew of the frigate Constitution, for the capture and subsequent destruction of the British frigate the Guerriere, I have the honor to state to you that the Constitution rated forty-four and mounted fifty-five guns; that the Guerriere rated thirty-eight and mounted fifty-four guns. The Guerriere, although entirely dismasted, &c. * * *

"PAUL HAMILTON.

"Hon. B. BASSETT."

Exhibit N is a resolution of Congress relative to the victory of the Peacock over the Epervier.

We have now set out the substance of the evidence. The claimants were the captors of the Epervier. The prize money amounted to \$171,401 68; one-half of which was paid by the marshal to the claimants, and the other half to the United States. The claimants contend that they were entitled to the whole of the \$171,401 68, and they bring this suit to recover from the United States the one-half of that sum, which one-half was illegally (as they say) paid to the United States by the marshal in 1814.

They rest their claim on two grounds:

First. That as the decrees condemn the Epervier and the specie as prize to the captors, the whole amount was thus vested in the claimants.

Secondly. That independently of that effect of the decrees, the claimants were entitled by law to the whole, because the Epervier was of equal or superior force to the Peacock.

As to the first question: The decree in the first suit condemns the Epervier, her tackle, apparel, guns, and other implements of war, as prize of war to the captors. In order to ascertain the effect of that decree we must look to the allegations of the libel and to what decree of condemnation the court had authority to render. The libel against the ship was substantially as follows: That the libellant, Lewis Warrington, commander of the United States sloop-of-war Peacock, on behalf as well of the United States as of himself and the officers and crew, alleges that war existed between the United States and Great Britain, and that captures of enemies' property were enjoined on all officers of the United States; that the libellant, therefore, with said sloop-of-war, her officers, and crew, on the 29th of April, 1814, captured on the high seas the British sloop-of-war Epervier, her apparel, &c., which was at the time commanded by a British officer, and was sailing under the British flag; that the Epervier, therefore, became forfeited. Prayer that the Epervier, her tackle, &c., may be attached, the persons interested cited, and that by the definitive decree of the court she be condemned as forfeited, to be distributed as by law is provided respecting the captures made by the public armed vessels of the United States.

Those facts contained in the libel make out a case for a decree of condemnation against the Epervier as prize of war to the United States; and that is all. To entitle the officers and crew of the Peacock to the whole of the property, they would have to allege and

prove that the *Epervier* was of equal or superior force to the *Peacock*. There was no allegation before the court relative to the force of either of the vessels, and, of course, the question as to whether the officers and crew of the *Peacock* were entitled to the whole or only the one-half of the prize or its proceeds, was not before the court, and they therefore had no authority to decide it. The capture was by a public armed ship belonging to the United States; and the officers and crew were employed and paid by the United States. In the case of such a capture, the only proper libel to be filed is a libel in the name of the United States showing the legality of the capture; and the only proper decree of condemnation in such case is, that the captured ship be condemned as prize of war to the United States. Even in England, where the captors, in the case of captures by national ships, take the whole of the prize, the libel is in the name of the king; and the decree of condemnation is, that the ship be adjudged and condemned as good and lawful prize to the king.—(Marriott's Formulary, 159, 198.) "It is an elementary principle of prize law (says Mr. Wheaton) that all rights of prize belong originally to the government, (the *Melomane*, 4 Rob., 4,) and the beneficial interests derived to others can proceed only from the grant of the government, and therefore all captures, wherever made, enure to the use of the government, unless they have been granted away.—(The *Elzebe*, 5 Rob., 173; *Sterling vs. Vaughan*, 11 East., 619; The *Maria Francaise*, 6 Rob., 282; The *Joseph*, 1 Gallis, 545.) In cases of public armed ships, duly commissioned for the capture, the condemnation is always to the government, but the proceeds are to be distributed according to the act of the 23d April, 1800, ch. 33, sec. 5 and 6."—(2 Wheat. Rep., Appendix, 71, 72.)

It is not until after the decree of condemnation to the United States in these cases that the inquiry is presented to the court as to the relative force of the two vessels, and as to the disposition of the proceeds of the prize.

The above observations, made with respect to the decree of condemnation against the captured vessel, apply to the decree against the specie which she had on board.

We think, therefore, that since the question as to how much the claimants were entitled to was not before the district court, the said decrees do not prevent us from examining the question. That question, (the second one in the cause,) namely, whether the claimants were entitled to the whole of said sum of \$171,401 68 on the ground that the *Epervier* was of equal or superior force to the *Peacock*, does not appear to be a difficult one to decide.

The act of Congress on the subject is as follows:

"That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors, and when of inferior force, shall be divided equally between the United States and the officers and men making the capture."—(2 Stat. L., 52, sec. 5.)

The allegation in the petition is that the two vessels carried each 18 guns, and were, therefore, of equal force. Captain Warrington's

official report of the capture, dated April 29, 1814, says that the *Epervier* rated and mounted 18 thirty-two pound carronades, and had 128 men. Lieutenant Nicholson, on his arrival at Savannah with the prize, says, in his report dated May 1, 1814, that the *Epervier* was a brig of 18 thirty-two pound carronades. The following communications are from the Secretary of the Navy :

“NAVY DEPARTMENT, *May 7, 1785.*

“SIR : In reply to your letter of the 30th ultimo, desiring information touching the comparative tonnage or size of the British sloop-of-war *Epervier* and the United States ship *Peacock*, weight of metal, and strength of the crews at the time of the capture of the former by the latter named vessel, I have to state that it appears that the *Epervier* was a brig of 18 guns—16 thirty-two-pounders and 2 eighteen-pounder carronades—and had a crew of 128 men. The *Peacock* was a ship of 22 guns—2 long 12s and 20 thirty-two-pounder carronades—and had a crew of 160 men. So far as the department is aware, the above are all the facts in the points referred to shown by its records.

“Very respectfully, your obedient servant,

“I. TOUCEY.

“JOHN D. MCPHERSON, Esq.,

“*Deputy Solicitor Court of Claims.*”

“NAVY DEPARTMENT, *January 12, 1859.*

“SIR : Your letter of the 6th instant has been received. You are informed, in reply, that all the ‘32-pounders’ on the *Epervier* were carronades, but the long 12s on the *Peacock* were not.

“I am, respectfully, your obedient servant,

“ISAAC TOUCEY.

“JOHN D. MCPHERSON, Esq.,

Deputy Solicitor Court of Claims.”

There can be no doubt, from this evidence, but that the force of the *Peacock* was considerably greater than that of the *Epervier*. She had more guns, and thirty-two men more than the *Epervier*. The *Peacock* had twenty-two guns, twenty of which were thirty-two-pounder carronades, the other two were long 12s. The *Epervier* had in all but eighteen guns, sixteen of which were thirty-two pound carronades, the other two were eighteen-pounder carronades. The *Peacock* had one hundred and sixty men, and the *Epervier* only one hundred and twenty-eight men. The consequence is, that, according to said act of Congress, the officers and crew of the *Peacock* were only entitled to one-half of the proceeds of the sale of the *Epervier*, and one-half of the specie found on board of her. That amount was paid to them by the marshal in 1814, soon after the decrees of condemnation were rendered. They have, therefore, in our opinion, no cause of action.

DAVID G. BARNITZ, ADMINISTRATOR OF DAVID GRIER.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

D. G. BARNITZ, ADMINISTRATOR OF DAVID GRIER, *vs.* THE UNITED STATES.

1. The petition of the claimant and amended petition.
2. Exhibits by the claimant, marked A, B, C, D, and numbered 15, 16, 17, 18, and 19, referred to in the opinion of the Court, and transmitted to the Senate.
3. Documents referred to by the Solicitor in his brief, and transmitted to the Senate.
4. Other evidence filed by the claimant, and transmitted to the Senate in a separate envelope.
5. Claimant's brief.
6. Solicitor's brief.
7. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said Court, at Washington, this third day February,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

DAVID G. BARNITZ, administrator of Lieut. Col. David Grier, *vs.* The UNITED STATES.

To the honorable the Court of Claims:

The petition of David G. Barnitz, a citizen of Pennsylvania, respectfully sheweth: That he is the administrator with the will annexed of

David Grier, deceased, who was a lieutenant colonel in the Pennsylvania line during the war of the revolution, and that the said David Grier having been seriously wounded during the battle of Paoli, from that time he became an acting assistant quartermaster, and was stationed at the borough of York, in the State of Pennsylvania. That as such quartermaster he received and disbursed large sums of money on account of the United States, and made large advances for the benefit of the said United States out of his own private means, which at the time were ample. Your petitioner further states, that the said David Grier died somewhere in the year 1790, leaving four children, all of whom were at the time under age, and all unmarried; and all of whom have since died without issue, except your petitioner's mother. Your petitioner was advised, that during the lifetime of said David Grier, he claimed to be entitled to commutation of five years' full pay, with interest, for his services in the war of the revolution, but, until within the last few years, he was unaware that large balances were due to him for his services and advances made by him while serving in the army of the United States. That, when seeking to prosecute the claim for commutation of the said Grier, he was advised to search among the papers left by his testator, to see what could be found among them to substantiate his claim, and, in doing so, he found in a desk which had remained unopened, so far as he knows or believes, from the time of his death, a paper which is in the following words:

"Certified that the United States are indebted to David Grier, an assistant in the quartermaster general's department at the post of York, in the sum of five thousand nine hundred and sixty dollars, for his services and expenses from the first day of April, one thousand seven hundred and seventy-eight, till the first of March instant.

"Given under my hand at Carlisle, in the State of Pennsylvania, this 15th day of March, A. D. 1780.

"JOHN DAVIS,
"Quartermaster General."

That on finding said certificate he caused an examination to be made in the proper office in the city of Washington, and from such examination he is advised and believes, not only that the same is still due and unpaid, but that there was also due to him at the time of his death, and is now due to his testator, other large sums of money, to wit, the sum of five thousand five hundred and seventy-four dollars and fifteen cents, besides interest—all of which will appear by reference to the proper books in the office of the Third Auditor of the treasury. Your petitioner further avers, that on making these discoveries he took the necessary steps to have his claim presented at the proper department, and asked the payment thereof; but there being no appropriation out of which it could be paid, he was advised to apply to Congress.

Your petitioner would further State, that at the 1st session of the 30th Congress, to wit, on the 12th January, 1848, as appears from the records, a petition was presented in the name of Margaret Barnitz, sole heir and legal representative of David Grier, to the House of Representatives, and was referred to the Committee on Revolutionary

Claims, asking for the commutation due to her deceased father. On the 9th March, 1848, Mr. Butler, from the committee, reported a bill, No 308, for the relief of Charles A. Barnitz, husband of Margaret Barnitz, the only surviving heir of Lieutenant Colonel David Grier, of the army of the revolution; which bill, at the 2d session of the 30th Congress, to wit, on the 22d day of December, 1848, passed the House of Representatives without amendment, and was sent to the Senate; when, as appears by the Journals, on the 26th December, 1848, the bill of the House, No. 308, was read a first and second time, and referred to the Committee on Revolutionary Claims. On the 9th February, 1849, Mr. Upham, from the committee, made an unfavorable report on the bill of the House, No. 308. At the 1st session of the 31st Congress, on the 23d January, 1850, in the House of Representatives, the petition of Margaret Barnitz, the surviving heir of Lieutenant Colonel David Grier, deceased, was presented and referred to the Committee on Revolutionary Claims; but it does not appear that during that Congress any further action was had thereon.

At the 1st session of the 32d Congress, in the House of Representatives, leave was granted for the withdrawal from the files of the House of the petition and papers of Margaret Barnitz, surviving heir of David Grier, for the purpose of reference to the Senate.

At the said 1st session of the 32d Congress the petition of Margaret Barnitz was presented to the Senate, and referred to the Committee on Revolutionary Claims. No further action appeared to have been taken at that session; and at the 2d session of the same Congress the Committee on Revolutionary Claims were, on motion, discharged from the further consideration of the claim of Margaret Barnitz, and leave was granted to her to withdraw her papers. At the 1st session of the 33d Congress, your petitioner, having as before stated found the certificate and evidence of debt due to the said David Grier, again presented to the Senate an amended petition, asking for the payment of the amount which appeared on the books of the treasury to be due to Lieutenant Colonel Grier, and also the commutation to which he was entitled. Her petition was referred to the Committee on Revolutionary Claims, who, on the 25th April, 1854, made a report, in which they admitted that the books of the treasury showed that there was due to Colonel Grier the sum of _____; but that, inasmuch as the claim was of such long standing, it was to be presumed that it had been paid; and therefore they reported adversely to that portion of her claim. They did not report a bill in favor of paying his commutation, because the committee say, that Colonel Grier being entitled to commutation, his claim was provided for in a general bill which they had reported, and which passed the Senate.

The foregoing contains, so far as your memorialist is informed and believes, a true statement of all the action taken on the claims herewith presented by either House of Congress, and will show that up to this time your petitioner has not been paid either the amount due to Lieutenant Colonel Grier for commutation, or the amounts shown to be due to him by the books in the Treasury Department. Your petitioner claims commutation under the act of Congress of March 22, 1783, (Laws of the U. S., vol. 1, page 687,) and alleges that the said

claims are, as he believes, justly due to him as administrator with the will annexed of the said Lieutenant Colonel David Grier; that as such administrator, and in right of his mother, who is the only surviving child of the said David Grier, he asks the court to decree the same as payable to him, the same never having been sold or conveyed away either by the said David Grier in his lifetime, so far as your petitioner is advised and believes, nor by him, as administrator, since his death; and that the said claims are the property of the said estate of Colonel Grier.

Your petitioner therefore prays an examination of this claim by your honorable court, and such an award as to you may seem meet.

STEVENSON, BAXTER & BRYAN,
Attorneys.

SIMON STEVENSON, *Attorney in fact*
of David G. Barnitz, ad'mr C. T. A. of Col. David Grier, deceased.

DISTRICT OF COLUMBIA, }
Washington County. }

Personally appeared before me, a justice of the peace in and for said county, Simon Stevens, attorney in fact for David G. Barnitz, administrator of David Grier, deceased, who, being duly sworn, deposes and says, that the facts stated in the foregoing petition are just and true so far as they exist in his own knowledge, and so far as obtained from the knowledge of others, he believes them to be true.

SIMON STEVENSON.

Sworn to and subscribed before me, this 29th day of January, A. D. 1856.

JOHN S. HOLLINGSHEAD, *J. P.*

UNITED STATES COURT OF CLAIMS.—No 497.

BARNITZ, administrator of GRIER, *vs.* THE UNITED STATES.

Amended petition.

To the honorable the Court of Claims:

The petition of David G. Barnitz, a citizen of Pennsylvania, respectfully represents: That he is the administrator, with the will annexed, of David Grier, deceased, who was a lieutenant colonel in the Pennsylvania line in the war of the revolution, and was severely wounded at the battle of Paoli; from and after which time he became unfit for active field operations, and resigned his commission as lieutenant colonel, and on the first day of April, A. D. 1778, became an assistant in the Quartermaster General's department, at the post of York, in the State of Pennsylvania. That, as such lieutenant colonel commanding the 7th Pennsylvania regiment, he received and disbursed large sums of money on account of the United States, and made large advances for the benefit of the United States out of his own

private means, which at that time were ample; and that, as assistant deputy quartermaster general at the post at York, he also received and disbursed large sums of money, and made advances out of his own private means, for which he has never been reimbursed. Your petitioner states that said Grier died in the year 1790, leaving four children, all of whom were at the time under age and unmarried, and all of whom have since died without issue, except your petitioner's mother, who died last year, leaving six children. Your petitioner was unaware until recently that there were large balances standing to his credit on the books of the treasury, and other sums due him upon original certificates from John Davis, deputy quartermaster general, for services, expenses, and advances made by him while in the service of the United States, as above recited. That when seeking to prosecute the claim of the said Grier for commutation pay, he was advised to search the books of the United States treasury, and to search among the papers left by his testator, to see what could be found among them to substantiate his claim, and in doing so he found in the books of the treasury, in the Third Auditor's office, in ledger "A," page 331, the following entries, a certified copy of which is now on file among the papers in the case, to wit:

DR.			<i>Lieut. Col. Grier, of the 7th Pennsylvania regiment.</i>			CR.		
4213.	To Major Alexander---	\$290 00	March, 1778.	By Wm. Palfrey-----	\$4,400 00			
	To balance transferred			By Major Alexander -	1,464 15			
	to folio 1952 -----	5,574 15						
		<u>5,864 15</u>					<u>5,864 15</u>	

Ledger E, folio 1952.—By balance from folio 331, \$5,574 15.

At the home of his mother he found an old military desk, belonging to Colonel Grier, which had remained unopened, as far as he knows and believes, from the time of the testator's death, and in which he found a large number of muster-rolls, pay-rolls, &c., together with a paper in the following words, to wit:

"Certified that the United States are indebted to David Grier, an assistant in the Quartermaster General's department, at the post of York, in the sum of five thousand nine hundred and sixty dollars, for his services and expenses from the first day of April, one thousand seven hundred and seventy-eight, till the first of March instant.

"Given under my hand, at Carlisle, in the State of Pennsylvania, this 15th day of March, A. D. 1780.

"JOHN DAVIS, D. Q. M. G."

And another paper, which is an account rendered by Colonel David Grier, A. D. Q. M. G., to John Davis, D. Q. M. G., of which the following is a true copy. The first item on the credit side of which account includes the foregoing certificate of John Davis, D. Q. M. G. The account is as follows, to wit:

Col. David Grier, A. D. Q. M. G., in account with J. Davis, D. Q. M. G.

DR.

To cash received from Colonel Pettit.....	\$6,700 00
To David Rittenhouse's draft on the treasurer of York county.....	136,666 60
To cash received per Dr. Henry's certificate.....	500 00
To balance due David Grier, A. D. Q. M. G.....	80,845 $\frac{16}{90}$
	224,711 $\frac{76}{90}$

CR.

By balance due 1st March, 1780, per settlement	\$74,775 $\frac{16}{90}$
Cash twice charged in last settlement.....	1,333 30
Expenditures in Q. M. dep't, March, 1780.....	9,532 00
Do. do. April, 1780.....	4,043 00
Do. do. May, 1780.....	80 00
Do. do. June, 1780.....	1,330 60
Do. do. July, 1780.....	15,475 00
Do. do. August, 1780.....	3,864 60
Do. do. Sept'r. 1780	3,113 60
By expenditures in forage dep't, March, 1780.....	8,245 00
Do. do. April, 1780.....	3,120 00
Do. do. May, 1780.....	6,259 00
Do. do. June, 1780.....	874 00
Do. do. July, 1780	65,476 00
Do. do. Sept'r, 1780.....	5,040 00
By amount of his account of wages and expenditures as A. D. Q. M. G., seven months.....	16,800 00
By do. as forage-master, three months	5,350 00
	224,711 $\frac{76}{90}$

By balance' as per contra, \$80,845 $\frac{16}{90}$.

"Received, Carlisle, 3d October, 1780, of Colonel David Grier, his accounts and vouchers in the quartermaster's department, and also in the forage department, from March to September of the current year, inclusive; and upon a settlement of the above account there appears to be eighty thousand eight hundred and forty-five dollars and sixteen-ninetieths of a dollar due said Grier, the vouchers being unexamined.

"JOHN DAVIS, D. Q. M. G."

The case, as presented to the Senate and referred to the Court of Claims for adjudication, consisted of three separate and distinct claims, as follows, to wit:

1st. For commutation as lieutenant colonel, (now abandoned.)

2d. For a balance standing to his credit on the books of the treasury, March, 1778, of..... \$5,574 15

Brought forward.....	\$5,574 15
3d. For balance of account rendered October 3, 1780, and certified by John Davis, D. Q. M. G., \$80,845 $\frac{1}{9}$ $\frac{6}{10}$, or specie value of.....	6,260 00

Making a claim of..... 11,834 15
to which interest is to be added from the time the same became due.

Your petitioner would further state, that at the first session of the thirtieth Congress, to wit, on the 12th January, 1848, as appears from the records, a petition was presented in the name of Margaret Barnitz, sole heir and legal representative of David Grier, to the House of Representatives, and was referred to the Committee on Revolutionary Claims, asking for the commutation due to her deceased father.

On the 9th March, 1848, Mr. Butler, from the committee, reported a bill, No. 308, for the relief of Charles A. Barnitz, husband of Margaret Barnitz, the only surviving heir of Lieutenant David Grier, of the army of the revolution; which bill, at the second session of the thirtieth Congress, to wit, on the 22d day of December, 1848, passed the House of Representatives without amendment, and was sent to the Senate; when, as appears by the journals, on the 26th December, 1848, the bill of the House, No. 308, was read a first and second time, and referred to the Committee on Revolutionary Claims.

On the 9th February, 1849, Mr. Upham, from the committee, made an unfavorable report on the bill of the House, No. 308. At the first session of the thirty-first Congress, on 23d January, 1850, in the House of Representatives, the petition of Margaret Barnitz, the surviving heir of Lieutenant Colonel David Grier, deceased, was presented and referred to the Committee on Revolutionary Claims; but it does not appear that, during that Congress, any further action was had thereon. At the first session of the thirty-second Congress, in the House of Representatives, leave was granted for the withdrawal from the files of the House of the petition and papers of Margaret Barnitz, surviving heir of David Grier, for the purpose of reference to the Senate.

And at the said first session of the thirty-second Congress the petition of Margaret Barnitz was presented to the Senate, and referred to the Committee on Revolutionary Claims. No further action appears to have been taken at that session; and at the second session of the same Congress the Committee on Revolutionary Claims were, on motion, discharged from the further consideration of the claim of Margaret Barnitz, and leave was granted to her to withdraw her papers. At the first session of the thirty-third Congress your petitioner having, as before stated, found the certificate and evidence of debt due to the said David Grier, again presented to the Senate an amended petition, asking for the payment of the amount which appeared to be due to Lieutenant Colonel Grier on the books of the treasury, and also the commutation to which he was entitled. Her petition was referred to the Committee on Revolutionary Claims, who, on the 25th April, 1854, made a report, in which they admitted that the books of the treasury showed that there was due to Colonel Grier the sum of

The foregoing contains, so far as your memorialist is informed and believes, a true statement of all the action taken on the claims herewith presented, by either house of Congress, and will show that up to this time your petitioner has not been paid either the amount due to Lieutenant Colonel Grier, as shown on the books of the Treasury Department, or the amount shown to be his due on the original accounts and certificates herewith submitted; that the said claims are, as he believes, justly due to him as administrator with the will annexed of the said Lieutenant Colonel David Grier; that, as such administrator, he asks the Court to decree the same as payable to him, the same never having been sold or conveyed away either by the said David Grier in his lifetime, so far as your petitioner is advised and believes, nor by him, as administrator, since his death; and that the said claims are the property of the said estate of Colonel Grier.

Your petitioner therefore prays an examination of this claim by your honorable Court, and such an award as to you may seem meet.

STEVENSON, BAXTER & BRYAN,
Attorneys.

DAVID G. BARNITZ,
Adm'r C. T. A. of Colonel David Grier, deceased.

DISTRICT OF COLUMBIA,
Washington County.

Personally appeared before me, a justice of the peace in and for said county, David G. Barnitz, administrator of David Grier, deceased, who, being duly sworn, deposes and says, that the facts stated in the foregoing petition are just and true so far as they exist in his own knowledge, and so far as obtained from the knowledge of others he believes them to be true.

DAVID G. BARNITZ.

Sworn to and subscribed before me, this 10th day of May, A. D. 1858.

F. J. MURPHY, *J. P.*

UNITED STATES COURT OF CLAIMS.—No. 497.

BARNITZ, administrator of Grier, *vs.* THE UNITED STATES.

Petitioner's brief.

David Grier was commissioned by John Hancock, President of Congress, to be a captain of a company of Pennsylvania troops, in the army of the United Colonies, on the 9th day of January, 1776. On the 6th of June following was promoted and commissioned by John Hancock, president of Congress, as major of the 6th battalion of Pennsylvania, and on the 12th of January, 1777, was promoted to and commissioned a lieutenant colonel of the 7th battalion of Pennsylvania, which said commissions are on file among the papers in this case. While in the service of the United States under said commissions he received, laid out, and expended large sums of money on

account of the United States, and made large advances for the benefit of the United States out of his own private means, and in March, 1778, the government was his debtor to the extent of \$5,574 15, which he has never been reimbursed, and now stands to his credit on the books of the Treasury Department, in the Third Auditor's office, in ledger "A," page 331, a certified copy of which is on file among the papers in the case.

That Lieutenant Colonel Grier resigned his commission as lieutenant colonel, and on the first day of April, 1778, became an assistant in the quartermaster's department at the post of York, in the State of Pennsylvania; in which latter capacity he also received and disbursed large sums of money, and made further large advances at various times out of his private means, when, on the 15th of March, 1780, and on the 3d day of October, 1780, he received from John Davis, deputy quartermaster general, certificates of the balances due said Colonel Grier, on a settlement of his accounts, the sum of \$80,845. $\frac{1}{9}$ $\frac{6}{10}$, which, scaled at specie value, amounts to \$6,260 00; which original certificates are on file among the papers in the case. That Colonel Grier died in 1790, leaving four children, all of whom were at the time under age and unmarried, and have since died without issue, except your petitioner's mother, who died last year, leaving six children. That the military chest containing the evidences of debt against the government remained unopened from the time of the death of Colonel Grier until 1854, which accounts for the claim never having been presented to the government before. The proceedings as recited in the amended petition, filed May 17, 1858, fully sets forth the petitioner's claim and the action of Congress thereon.

Recapitulation.

For a balance standing to his credit on the books of the treasury March, 1778	\$5,574 15
For balance of account rendered October 3, 1780, and certified by John Davis, deputy quartermaster general, \$80,845. $\frac{1}{9}$ $\frac{6}{10}$, or specie value of.....	6,260 00

Making the entire claim..... 11,834 15
exclusive of interest on the same from the time it became due.

SIMON STEVENS,
Attorney for Petitioner.

IN THE COURT OF CLAIMS.—No. 497.

BARNITZ, administrator of Grier, *vs.* THE UNITED STATES.

Solicitor's brief.

The petitioner claims payment of two several demands against the United States arising from transactions during the revolutionary war.

1st. An amount of \$5,574 $\frac{1}{9}$ $\frac{5}{10}$, standing to his credit under date March, 1778, on ledger A, in the Third Auditor's office. 2d. A balance

\$80,845 $\frac{1}{9}$ (continental money) due him October 3, 1780, per account rendered to John Davis, deputy quartermaster general.

Both of these claims are barred by acts of limitation, particularly by act of February 12, 1793, section 1, (1 Statutes, 301.)

A balance on the books of the treasury is but *prima facie* evidence of the indebtedness of the government, and against it we show that there is at least one item of charge for money advanced to Grier on the books of the Register's office which has not been brought to his debit on the Third Auditor's ledger A, (Auditor's report of March 10, 1854,) and, moreover, that the books of the treasury are incomplete, several journals and day-books having been burnt, (Third Auditor's report of February 11, 1853;) the latest of the balances claimed is in October, 1780. Col. Grier remained a long time in the service of the United States after this date, receiving and disbursing money and settling accounts as late, certainly, as May, 1782, (see papers numbered 15, 16, 17, and 18,) and the presumption is, that all balances due in 1778 and 1780 were carried forward and merged in the subsequent accounts.

About the close of the war commissioners were appointed under resolutions of February 27, 1782, (3 Journals, 465,) and July 4, 1783, (4 Journals, 437,) to settle all accounts of every kind and issue certificates in liquidation thereof. One of these commissioners was Benjamin Stelle, and on the 20th of December, 1785, Col. Grier gave, or at least prepared for, this commissioner a list of claims for which he himself had given certificates, for the purpose of being so liquidated, (original filed by claimant.) Being thus in communication with the proper authorities on the subject of his own official accounts and transactions, it is not to be presumed that he would omit the opportunity to have his own accounts settled, as well as aid others in obtaining settlements. That no final settlement certificate was issued to him, (Register's letter to the Hon. T. Stevens, June 20, 1853,) only shows that no balance was due him, not that no settlement took place.

Col. Grier himself made no claim in his lifetime, though he lived till 1790; and it would further appear from the manner in which the claim is stated to have been discovered by the administrator, that Col. Grier died without informing any of his family that he had a claim against the United States.

J. D. McPHERSON,
U. S. Deputy Solicitor.

IN THE COURT OF CLAIMS.

D. G. BARNITZ, administrator of David Grier, *vs.* THE UNITED STATES.

LORING, Justice, delivered the opinion of the Court.

David Grier was a lieutenant colonel in the Pennsylvania line in the war of the revolution, from the 12th January, 1777, until April 1, 1778, when he resigned his commission as lieutenant colonel, and

was appointed assistant deputy quartermaster general. He served in the latter capacity for some years, and as is shown by the papers in the case, at least till May, 1782. He died in 1790, leaving four children who were then unmarried and under age; of these children, three died without issue, the other was married, and died about 1857, leaving six children, one of whom is the petitioner.

The allegation in the petition is, that David Grier, both as lieutenant colonel, and as acting deputy quartermaster general, received and expended, and advanced large sums of money on account of the United States, and that there was due to him at his decease a balance in each department of his service, and which the petitioner sets forth, as follows :

For a balance standing to his credit on the books of the treasury, March, 1778.....	\$5,574 15
For a balance of account rendered October 3, 1780, and certified by John Davis, deputy quartermaster general, \$80,845 $\frac{1}{10}$	6,260 00
	11,834 15

The evidence relied on for the first item, which relates to Colonel Grier's accounts as lieutenant colonel, is the account shown in schedule A, and taken from the books of the treasury, and it states the balance to Colonel Grier's credit to be \$5,574 75.

This balance, as the account shows, is made up chiefly of \$4,400, paid by Colonel Grier to William Palfrey on account of the United States. But it appears from schedule B annexed, which is William Palfrey's account with the United States of moneys received by him "of several officers of the army on a settlement of their accounts with the auditors of the army, and not before entered in the books of the treasury;" that Colonel Grier received this \$4,400 from Mease and Caldwell, as *recruiting money*; and it appears from schedule C annexed, that Colonel Grier "*has been omitted to be charged*" with such receipt, and deducting said sum of \$4,400 from the balance of \$5,574 15, claimed by the petitioner, reduces that balance to \$1,174 15.

Moreover, the entry in schedule B is in these words: "September, 1777. Lieutenant Colonel Grier, 7th regiment, being '*part of*' recruiting money received of Mease and Caldwell, \$4,400." The expression "*part of*" indicates that Colonel Grier received of Mease and Caldwell a larger sum, as recruiting money, than the \$4,400 paid over to William Palfrey. But what the amount received was, cannot now be shown, for the names of Mease and Caldwell do not appear on the books at the treasury. Some of its books (day books and journals) have been burnt, (schedule C,) and there are now, therefore, no means of tracing the transaction further. Then the balance claimed of \$5,574 15 is an item of an account in the Third Auditor's office, and not a final balance entered or certified at the registry; and that it cannot be relied on as evidence of a *final* balance, is shown by the entry in William Palfrey's account, and the facts above stated.

As to the second item claimed, viz: the balance of \$6,260, alleged

to be due to Colonel Grier as assistant deputy quartermaster general, in his accounts with the United States, the evidence relied on is the account and certificate of John Davis, shown in schedule Z annexed, and set forth in the amended petition, pp. 2 and 3.

These evidences, as the petition shows, were found among Colonel Grier's papers after his death.

But there is no evidence that those accounts were ever presented at the treasury by Colonel Grier, or that he ever claimed there such balance in his lifetime, and neither the accounts or balance appear in any shape on the books of the treasury. And it appears on the certificate of John Davis, deputy quartermaster general, appended to the account, that the vouchers presented with it were *not examined*. It is certain, therefore, that the certificate was not intended for a final adjustment of the account, or to establish the apparent balance it specifies; and the inference is that the certificate was given only as a receipt for the papers delivered between Colonel Grier and John Davis.

It is a matter of general history, that before and after the close of the war of the revolution, strenuous efforts were made by Congress to collect the debts and demands outstanding against the United States, that they might be fixed in amount, and certificates for them issued. Under the resolves of February 27, 1782, (3 Journals, 465,) and July 4, 1783, (4 Journals, 437,) commissioners were appointed for the purpose, and one of these was Benjamin Stelle. It appears from the evidence (schedules 15, 16, 17, 18) that Colonel Grier himself certified such debts; and from schedule 19, that as late as December 20, 1785, he furnished for Mr. Stelle a list of the debts against the United States which he had himself certified. And there is no evidence that he preferred or claimed any debt as due to himself, nor does it appear that any certificate of debt was issued in his favor, (schedule D.)

It moreover appears that Colonel Grier lived until 1790, (petition, p. 1,) and it is not shown or alleged that he ever, in his lifetime, claimed any balance to be due to him from the United States; and all the evidence now adduced by the petitioner was found by him after Colonel Grier's death, when seeking for evidence for another matter.

Under the circumstances above stated, impugning the evidence adduced by the petitioner for each of the items he claims, connected with the facts that Colonel Grier lived until 1790, ten years after these claims are alleged to be due—was an accounting officer of the United States, certified the debts of others, and made no claim or representation (so far as is shown) of any debt due to himself—we are of opinion the petitioner fails to establish a title to the relief he prays.

SAMUEL F. HOLBROOK.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

SAMUEL F. HOLBROOK *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Brief of the United States Solicitor.
3. Opinion of the Court refusing an order to take testimony.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said Court, at Washington, this 3d day of February,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims:

The petition of Samuel F. Holbrook respectfully represents: That in the year 1847 the American brig Sabine sailed from the port of Boston, Massachusetts, for the port of San Francisco, California, laden with American goods belonging to your petitioner; that on the 21st of April, in the year 1848, said brig arrived at the port of San Francisco; that at the time of her arrival a treaty of peace had been made with Mexico, and San Francisco had become a portion of the United States; that the person acting as collector of said port, not knowing of the existence of said treaty, compelled your petitioner (who was represented at said port by his son) to pay duties on said cargo, the cargo consisting of goods the growth and manufacture of the United States, sent from one American port to another American port.

Your petitioner alleges that he so paid duties illegally exacted to the amount of three thousand six hundred and thirty-three dollars and eighty-three cents to the collector of San Francisco, between the 26th of April, 1848, and the 14th day of December, 1848; that he has repeatedly requested of the Secretary of the Treasury to refund the said duties so illegally exacted, but he declines so to do.

Your petitioner therefore prays your honorable Court to report a bill to Congress for his relief.

Your petitioner further represents that he is the sole owner of the above claim.

DISTRICT OF COLUMBIA, }
County of Washington, } ss.

On this — day of December, A. D. 1855, personally came before the subscriber, a justice of the peace in and for the county and District aforesaid, C. K. Green, and made oath that the facts as set forth in the above petition are true, according to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

ON THE PETITION OF SAMUEL F. HOLBROOK.

Brief of the United States Solicitor.

This is a claim for three thousand six hundred and thirty-three dollars and eighty-three cents, alleged to have been paid to the collector of customs at San Francisco, between the 21st April, 1848, and the 14th of December, 1848, as duties on American goods, which were shipped at Boston, Massachusetts, in the previous year. The only proof of payment offered is the deposition of a witness who professes to have derived his information from the books of the collector. This is incompetent evidence. If the petitioner shall hereafter file the proper evidence, however, I shall not object to its being considered by the Court as if presented before the hearing.

This claim is put on the ground that the treaty with Mexico of 1848, which was ratified on the 30th May, took effect with respect to California on the 2d February, the date of the signature, the United States being then in possession of that country; whence it is inferred that California is to be deemed to have been a part of the United States on the 2d February, 1848, and open to American goods without the payment of the duty imposed by the government *de facto* of California, and therefore the taxes imposed in the intermediate time between the 2d February and the 30th July, as these were, must be refunded.

The questions in this case are all decided by the Supreme Court of the United States in the case of *Cross et al. vs. Harrison*, 16 Howard, 164, where, at p. 190, the Court say: "San Francisco had been conquered by the arms of the United States as early as 1846. * * * Early in 1847 the President * * authorized the military and naval

commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army, which had the conquest or possession. * * * * No one can doubt that these orders were according to the law of arms, * * or that they were operative *until the ratification and exchange* of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. * * * *In this instance it is recognized by the treaty itself.* Nothing is stipulated in that treaty to be binding upon the parties to it, from the date of the signature of the treaty, but that commissioners should be appointed by the commander-in-chief of the forces of the United States, with such as might be appointed by the Mexican government, to make a provisional suspension of hostilities, that, in the places occupied by our arms, constitutional order might be re-established as regards the political, administrative, and judicial branches in those places, so far as that might be permitted by the circumstances of military occupation. All else was *contingent* until the ratifications of the treaty *were exchanged*, which was done on the 30th May, 1848, at Queretaro; and there is in the third article full recognition by Mexico of the belligerent rights exercised by the United States during the war in its ports which had been conquered. In that article, besides other things provided for, it was stipulated that the United States, upon the ratification of the treaty by the two republics, should despatch orders to all persons in charge of the custom-houses at all ports occupied by the forces of the United States to deliver possession of the same to persons authorized to receive them, together with all bonds for duties on importations and exportations not yet fallen due, and that an exact account should be made out, showing the entire amount of all duties on imports and exports collected at such custom-houses or elsewhere in Mexico by authority of the United States, *after the ratification of the treaty* by Mexico, with the cost of collection, all of which was to be paid to the Mexican government, subject to a deduction of what had been the cost of collection. The plaintiffs, therefore, can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. *Until that time California had not been ceded, in fact, to the United States, but it was a conquered territory, within which the United States were exercising belligerent rights*, and whatever sums were received for duties upon foreign merchandise, they were paid under them. But *after the ratification* of the treaty California became a part of the United States, or a ceded conquered territory." The Court then proceeds to inquire upon what footing collections were to be placed, made after the ratification and before the proclamation of peace in California, and decides that the duties collected under the war tariff were still legally imposed.

It is true that the duties collected from Cross were imposed on foreign goods, and Holbrook's may have been American goods, but that difference was not material at the time when the duties were imposed on Holbrook's goods, according to the decision above quoted. For "until that time," (May 30,) says the Court, "California had not

been ceded, in fact, to the United States, but was a conquered territory, within which the United States were exercising belligerent rights." And the Court also say that "no one can doubt that the orders of the President," under which the civil government was established and duties imposed, "were according to the laws of arms and the rights of conquest." And the whole proceedings of the President are approved and pronounced rightful and legal by the Court.

The United States had dominion over California even prior to the treaty which annexed it permanently, which enabled the commander-in-chief of our army and navy to establish a civil government and impose taxes.

And these proceedings, which were confessedly legal at the time they were adopted, could not become illegal by subsequent events.

The decisions of the Supreme Court in *Reynie's case*, 9 Howard, 127, and in *Davis vs. Police Jury of Concordia*, *ibid.*, 280, which declare that the treaty of St. Ildefonso took effect on 1st October, 1800, so as to invalidate grants of land made by Spain in Louisiana subsequent to that date, do not deny the right of the Spanish officers in that province to carry on the government till it was actually transferred to the United States; but, on the contrary, these cases assert repeatedly that the right of the government *de facto* continued for municipal and commercial purposes.

No matter, therefore, what the existing government had been in California when the treaty of Guadalupe Hidalgo was signed. Its commercial and municipal regulations continued in force till the treaty was adopted and the government of the United States acted to modify or repeal them. The taxes imposed, therefore, which were collected to carry on this existing government, and which it is admitted were rightfully imposed at the date at which they were collected, did not revert to the citizen by the ratification of the treaty.

Aside from all precedents or authority, it is obvious that the proposition that taxes which were collected by a recognized and lawful local government, for the purpose of maintaining itself and protecting the payers in their civil rights, should revert to them afterwards in consequence of the ratification of a treaty which changed the sovereignty of the province from one distant power to another, could not be maintained. If the title to the taxes levied by the local government after the signature became diverted by the ratification of the treaty, every other act of the local government, or under its authority, must also become illegal. This would, in fact, annul not only the acts of the government respecting its revenue, and the punishment of offenders against it, but it would equally annul every civil transaction between citizens in which the authority of officers or courts was necessary.

M. BLAIR.

IN THE COURT OF CLAIMS.

SAMUEL F. HOLBROOK *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

This case is now before us on an application for an order directing the taking of testimony. The petitioner states the following case:

In the year 1847 the American brig *Sabine* sailed from Boston, Massachusetts, for San Francisco, California, laden with American goods belonging to the petitioner. She arrived at San Francisco on the 21st day of April, A. D. 1848. A treaty of peace had then been made with Mexico, and San Francisco had become a portion of the United States. The person acting as collector of the port of San Francisco compelled the petitioner to pay the sum of three thousand six hundred and thirty-three dollars and eighty-three cents for duties on the goods. This the petitioner avers was an illegal exaction. He has repeatedly requested the Secretary of the Treasury to refund the money so paid, but he declines to do so.

It is alleged in the petition that the payment was made between the 26th day of April and the 14th day of December, A. D. 1848; but in the argument it was stated on both sides that the question now designed to be submitted to this Court is, whether the duties, if paid after the signing of the treaty with Mexico, but before its ratification, were legally exacted.

In the case of *Cross vs. Harrison*, 16 How. R., 164, 190, the Court say: "California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward the United States had military occupation of all of Upper California. Early in 1847 the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army which had the conquest in possession. We will add, by way of note to this opinion, references to all of the correspondence of the government upon this subject, now only referring to the letter of the Secretary of War to General Kearney, of the 10th of May, 1847, which was accompanied with a tariff of duties on imports and tonnage, which had been prepared by the Secretary of the Treasury, with forms of entry and permits for landing goods, all of which was reported by the Secretary to the President on the 30th of March, 1847.—(Senate Doc. No. 1, 1st session 30th Congress, 1847, pp. 567, 583.) No one can doubt that these orders of the President, and the action of our army and navy commanders in California in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the treaty itself. Nothing is stipulated in that treaty to be binding upon the parties to it, or from the date of the signature of the treaty, but that commissioners should be

appointed by the general-in-chief of the forces of the United States, with such as might be appointed by the Mexican government, to make a provisional suspension of hostilities, that, in the places occupied by our arms, constitutional order might be re established as regards the political, administrative, and judicial branches in those places, so far as that might be permitted by the circumstances of military occupation. All else was contingent until the ratifications of the treaty were exchanged, which was done on the 30th of May, 1848, at Queretaro; and there is in the third article of the treaty a full recognition by Mexico of the belligerent rights exercised by the United States during the war in its ports which had been conquered. In that article, besides other things provided for, it was stipulated that the United States, upon the ratifications of the treaty by the two republics, should despatch orders to all persons in charge of the custom-houses, at all ports occupied by the forces of the United States, to deliver possession of the same to persons authorized by Mexico to receive them, together with all bonds and evidences of debts for duties on importations and exportations not yet fallen due, and that an exact account should be made out showing the entire amount of all duties on imports and exports collected at such custom-houses or elsewhere in Mexico by the authority of the United States after the ratification of the treaty by Mexico, with the cost of collection, all of which was to be paid to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications, subject to a deduction of what had been the cost of collection.

“The plaintiffs, therefore, can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded, in fact, to the United States; but it was a conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them.

“But after the ratification of the treaty California became a part of the United States, or a ceded, conquered territory.”

The tariff under which the duties in this case were collected is the same which was mentioned by the Court in the case of *Cross vs. Harrison*. It levied duties alike upon foreign and domestic goods.—(Ex. Doc. No. 1, 1st session 30th Congress, p 567.) Its validity has not been questioned. The only ground on which it has even been suggested that, in this case, the duties were illegally exacted is, that California became a part of the territory of the United States immediately upon the signing of the treaty with Mexico. But this ground is wholly untenable. In the case of *Cross vs. Harrison* the Supreme Court, in effect, declare that California did not become a part of the territory of the United States till the ratifications of the treaty were exchanged.

The petitioner's claim is for duties paid after the signing, but before the ratification of the treaty. We are of the opinion that it is not well founded.

No order will be made directing the taking of testimony in this case.

REPORT

REPORT

To the Honorable the Senate and House of Representatives of the United States in Congress assembled

Presented in pursuance of a resolution of the House of Representatives, passed May 10, 1877

ALEXANDER CROSS, of the District of Columbia

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WILLIAM H. RAYMOND

Chief Clerk of the House

SAMUEL F. HOLBROOK.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

SAMUEL F. HOLBROOK *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Brief of the United States Solicitor.
3. Opinion of the Court refusing an order to take testimony.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said Court, at Washington, this 3d day of February,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims:

The petition of Samuel F. Holbrook respectfully represents: That in the year 1847 the American brig Sabine sailed from the port of Boston, Massachusetts, for the port of San Francisco, California, laden with American goods belonging to your petitioner; that on the 21st of April, in the year 1848, said brig arrived at the port of San Francisco; that at the time of her arrival a treaty of peace had been made with Mexico, and San Francisco had become a portion of the United States; that the person acting as collector of said port, not knowing of the existence of said treaty, compelled your petitioner (who was represented at said port by his son) to pay duties on said cargo, the cargo consisting of goods the growth and manufacture of the United States, sent from one American port to another American port.

Your petitioner alleges that he so paid duties illegally exacted to the amount of three thousand six hundred and thirty-three dollars and eighty-three cents to the collector of San Francisco, between the 26th of April, 1848, and the 14th day of December, 1848; that he has repeatedly requested of the Secretary of the Treasury to refund the said duties so illegally exacted, but he declines so to do.

Your petitioner therefore prays your honorable Court to report a bill to Congress for his relief.

Your petitioner further represents that he is the sole owner of the above claim.

DISTRICT OF COLUMBIA, }
County of Washington, } ss.

On this — day of December, A. D. 1855, personally came before the subscriber, a justice of the peace in and for the county and District aforesaid, C. K. Green, and made oath that the facts as set forth in the above petition are true, according to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

ON THE PETITION OF SAMUEL F. HOLBROOK.

Brief of the United States Solicitor.

This is a claim for three thousand six hundred and thirty-three dollars and eighty-three cents, alleged to have been paid to the collector of customs at San Francisco, between the 21st April, 1848, and the 14th of December, 1848, as duties on American goods, which were shipped at Boston, Massachusetts, in the previous year. The only proof of payment offered is the deposition of a witness who professes to have derived his information from the books of the collector. This is incompetent evidence. If the petitioner shall hereafter file the proper evidence, however, I shall not object to its being considered by the Court as if presented before the hearing.

This claim is put on the ground that the treaty with Mexico of 1848, which was ratified on the 30th May, took effect with respect to California on the 2d February, the date of the signature, the United States being then in possession of that country; whence it is inferred that California is to be deemed to have been a part of the United States on the 2d February, 1848, and open to American goods without the payment of the duty imposed by the government *de facto* of California, and therefore the taxes imposed in the intermediate time between the 2d February and the 30th July, as these were, must be refunded.

The questions in this case are all decided by the Supreme Court of the United States in the case of *Cross et al. vs. Harrison*, 16 Howard, 164, where, at p. 190, the Court say: "San Francisco had been conquered by the arms of the United States as early as 1846. * * * Early in 1847 the President * * authorized the military and naval

commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army, which had the conquest or possession. * * * * No one can doubt that these orders were according to the law of arms, * * or that they were operative *until the ratification and exchange* of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. * * * *In this instance it is recognized by the treaty itself.* Nothing is stipulated in that treaty to be binding upon the parties to it, from the date of the signature of the treaty, but that commissioners should be appointed by the commander-in-chief of the forces of the United States, with such as might be appointed by the Mexican government, to make a provisional suspension of hostilities, that, in the places occupied by our arms, constitutional order might be re-established as regards the political, administrative, and judicial branches in those places, so far as that might be permitted by the circumstances of military occupation. All else was *contingent* until the ratifications of the treaty *were exchanged*, which was done on the 30th May, 1848, at Queretaro; and there is in the third article full recognition by Mexico of the belligerent rights exercised by the United States during the war in its ports which had been conquered. In that article, besides other things provided for, it was stipulated that the United States, upon the ratification of the treaty by the two republics, should despatch orders to all persons in charge of the custom-houses at all ports occupied by the forces of the United States to deliver possession of the same to persons authorized to receive them, together with all bonds for duties on importations and exportations not yet fallen due, and that an exact account should be made out, showing the entire amount of all duties on imports and exports collected at such custom-houses or elsewhere in Mexico by authority of the United States, *after the ratification of the treaty* by Mexico, with the cost of collection, all of which was to be paid to the Mexican government, subject to a deduction of what had been the cost of collection. The plaintiffs, therefore, can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. *Until that time California had not been ceded, in fact, to the United States, but it was a conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandise, they were paid under them. But after the ratification of the treaty California became a part of the United States, or a ceded conquered territory.*" The Court then proceeds to inquire upon what footing collections were to be placed, made after the ratification and before the proclamation of peace in California, and decides that the duties collected under the war tariff were still legally imposed.

It is true that the duties collected from Cross were imposed on foreign goods, and Holbrook's may have been American goods, but that difference was not material at the time when the duties were imposed on Holbrook's goods, according to the decision above quoted. For "until that time," (May 30,) says the Court, "California had not

The first part of the paper is devoted to a general
discussion of the problem. It is shown that the
problem is of great importance and that it has
not been completely solved. The author then
presents a new method for solving the problem.
This method is based on the use of the
Fourier transform. It is shown that this
method is very effective and that it can be
applied to a wide range of problems. The
author then gives some examples of the
application of this method. It is shown that
the method can be used to solve problems
in physics, engineering, and mathematics.
The author concludes by stating that the
method is a powerful tool for solving
problems of this type. It is hoped that
this paper will be of interest to those
who are concerned with the solution of
this type of problem.

ALEXANDER CROSS.

FEBRUARY 3, 1859.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ALEXANDER CROSS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Two statements of the claimant's account, with and without interest, and papers relating thereto, marked A B C, transmitted to the House of Representatives.
3. Agreement between United States Solicitor and claimant's counsel relating to papers therein named, and numbered from 1 to 6, inclusive, transmitted to the House of Representatives.
4. Consent of United States Solicitor as to the manner of taking testimony and depositions taken in the case, and numbered from 1 to 11, transmitted to the House of Representatives.
5. Certified documents from the Treasury Department, with an additional letter from the Secretary of the Treasury, and other letters relating to the case, transmitted to the House of Representatives.
6. Claimant's brief.
7. Opinions of each of the Judges of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this third day of February,
[L. s.] A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

To the honorable the Judges of the Court of Claims:

Your petitioner, Alexander Cross, a citizen of the United Kingdom of Great Britain and Ireland, and now residing at San Francisco, in the State of California, respectfully represents and states: That on the 28th of April, A. D. 1849, one Daniel Saffarans, of the State of Tennessee, entered into an article of agreement with James Collier, the collector of the port of San Francisco, in the State of California, by which the said Saffarans covenanted that he would well and substantially erect, build, and finish a store or building in said San Francisco, of the dimensions and description following, viz: the store to be four stories high, twenty-five feet wide, and one hundred feet long, to be constructed of stone and brick, so far as may be necessary to make it strictly fire-proof, and to be built in the strongest and most approved manner—the site of the building to be selected by the said collector—and to be finished and erected ready for occupancy by the 1st of September, A. D. 1850; the store, when finished, approved, and accepted by the collector, to be rented to the United States for the term of fifteen years, the rent per annum to be determined upon and fixed by the collector at the time said store should be erected, and received by said collector. For a more particular knowledge of the contents of said article of agreement, reference is here had to a copy thereof, which is hereunto annexed, and marked “Exhibit No. 1.”

On the 8th day of May, A. D. 1849, the abovementioned article of agreement, with certain reservations and conditions, was approved of by W. M. Meredith, the then Secretary of the Treasury, one of which was, that the rate of rent to be paid for the building to be agreed upon by the collector should be subject to the express approval of the Secretary of the Treasury; a true copy of which approval of said articles of agreement is hereto annexed, marked “Exhibit No. 2.”

That the said Daniel Saffarans being without the means necessary to carry said contract into effect, and in order to procure the same, did, on the 17th of May, A. D. 1849, by his power of attorney of that date, fully authorize one George N. Sanders, of the city of New York, to negotiate a loan or loans of money with any person or persons in the United States of America or elsewhere, for the purpose of fulfilling and completing said contract; a true copy of which power is hereto annexed, marked “Exhibit No. 3.”

That, under and in virtue of said power of attorney, said Sanders, on the 9th of January, A. D. 1850, entered into a contract of that date with your petitioner, who was then the head of a commercial house in Glasgow, Scotland, and of another commercial house in San Francisco, California, by which your petitioner undertook that said commercial houses should attend to the carrying out of said Saffarans' said contract, for and in his behalf, and should advance the capital necessary, in Europe and California, to the extent of fifty thousand dollars, at a rate of interest, and to be reimbursed in the manner

therein provided, with various other provisions and covenants which it is not deemed necessary to specify, inasmuch as will be hereinafter stated, your petitioner, in order to secure himself for his advances, was subsequently obliged to purchase in, and take an assignment of, the entire interest of said Saffarans in said contract and of the building erected under it. A true copy of said contract between said Saffarans and your petitioner, made as above stated by said Sanders, as his attorney, on said 9th day of January, 1850, is hereto annexed, marked "Exhibit No. 4."

That, in compliance with his said contract with said Saffarans, your petitioner, through said commercial houses, advanced the necessary capital, and erected the building in all respects in conformity to the requirements of the contract of said Saffarans with said collector of the port of San Francisco, first herein above mentioned, and on the site selected by the said collector for said building.

And to do this, instead of fifty thousand, your petitioner found himself under the necessity of advancing the sum of one hundred thousand dollars or thereabouts.

When the building was completed and ready for the occupancy of the government, the then Secretary of the Treasury, (Thomas Corwin,) anticipating that the then high rates of rents in San Francisco could not be permanently maintained, was very desirous of procuring a change of that provision of the contract of the 28th of April, A. D. 1849, which bound the government to rent the building for the term of fifteen years. Yielding to the urgent solicitations of the Secretary of the Treasury in this particular, the said Daniel Saffarans reluctantly consented that the term of the lease should be reduced from fifteen years to ten. Accordingly, on the 11th of November, A. D. 1850, a supplemental contract was entered into by T. Butler King, the then collector of the port of San Francisco, of the one part, and said Saffarans of the other, in modification of, and to carry into effect, the said contract of said 28th of April, A. D. 1849. This last contract reduced the term of the lease to ten years, and fixed the rent at fifteen hundred dollars per month, payable monthly by the collector of San Francisco; a true copy of which said last named contract is hereunto annexed, marked "Exhibit No. 5."

This last contract was entered into by the said collector, T. Butler King, at the city of Washington, and was on the same day approved by the Secretary of the Treasury, on the express understanding and condition that the said T. Butler King, on his arrival at San Francisco, should first examine the warehouse and duly accept the same, as being substantially of the character, description, and dimensions required by the stipulations contained in said article of agreement of 28th April, A. D. 1849. Which said approval of said Secretary was endorsed on said supplemental contract, a true copy of which is hereunto annexed, marked "Exhibit No. 6."

The said T. Butler King, on his arrival at San Francisco, first examined the said warehouse, and then endorsed on said contract his acceptance of said building, to take effect as of the date of the 14th of January, 1851; a true copy of which acceptance is hereunto annexed, marked "Exhibit No. 7."

The contract with the government being thus fully completed, and the said Saffarans being wholly unable to reimburse the advances of capital made by your petitioner in the erection of the building, he was driven to the necessity of negotiating with said Saffarans for the purchase of his interest in the warehouse; and to effect this he was compelled to take the building and ground on which it stands at cost, and give to Saffarans a bonus or profit of twenty thousand dollars.

The preliminaries of a purchase being arranged, the said Saffarans, by his writing under his hand and seal, of the date of the 10th July, A. D. 1851, executed by him in the State of Tennessee, assigned and conveyed to your petitioner his said articles of agreement with the government of the United States, with all the rights, rents, and interests accrued, or to accrue, under and in virtue of the same. Which said assignment was by him transmitted to California to his son, Isaac Saffarans, with an endorsement on it stating that it was to be held as an escrow, and not to be valid until R. H. Crittenden, A. P. Sheldon, and said Isaac Saffarans should endorse upon it their approval. A true copy of which assignment and endorsement upon it is hereunto annexed, marked "Exhibit No. 8."

Said Saffarans, along with his assignment, transmitted to California a power of attorney of the same date, (viz: July 10, 1851,) authorizing Robert H. Crittenden, Isaac Saffarans, and A. P. Sheldon to deliver said assignment to your petitioner, with a power of substitution. A true copy of which power is hereto annexed, marked "Exhibit No. 9."

It so happened that said Crittenden and Sheldon had both left the State of California before the arrival and receipt there of said assignment; by reason whereof the said R. H. Crittenden, by his power of attorney, dated at New York, July 25, 1851, substituted as his attorney, under said original power, George W. Guthrie, of San Francisco, to act for him and in his stead and place. A true copy of which substituted power is hereto annexed, marked "Exhibit No. 10."

By virtue of said power of attorney and substituted power, the said Robert H. Crittenden, by his attorney, George W. Guthrie, and the said Isaac Saffarans, by and for himself, did, on the 15th of September, A. D. 1851, endorse on said assignment of said Daniel Saffarans their approval thereof.

And afterwards, on the 19th of November, A. D. 1851, the said A. P. Sheldon, by his substituted power, authorized Isaac Saffarans, B., of San Francisco, to endorse for him, as his attorney, his approval of said assignment, as will appear by a true copy of said last named substituted power of attorney, hereunto annexed, marked "Exhibit No. 11."

On the 6th of January, 1852, the said A. P. Sheldon, by his attorney, (the said Isaac Saffarans, B.,) endorsed on said assignment his approval thereof, whereby the said assignment became complete, and took effect as a transfer to your petitioner of the entire interest in said warehouse, together with all the rights, rents, and interests accrued, or to accrue, under and in virtue of said Daniel Saffarans' said contract with the United States; and your petitioner to the present time has remained, and does remain, the sole proprietor of the same.

The said assignment being thus completed, and having taken effect in law, the said Daniel Saffarans, by his attorney, Isaac Saffarans, B., by a note or memorandum in writing, endorsed on said contract with the government, addressed to the Hon. T. Butler King, collector of the port of San Francisco, requested that all back and future rents arising under the contract might be paid to said Alexander Cross. A true copy of which note of request is hereto annexed, marked "Exhibit No. 12."

And your petitioner states that said collector of said port of San Francisco was, immediately after said assignment and written request, duly notified thereof, who, in conformity thereto, accepted and recognized your petitioner as the landlord of the government; and from the 14th of January, 1851, to the 14th of August, 1853, the rent of said warehouse was regularly paid monthly to your petitioner, in pursuance to said contract with the government.

On the 12th day of April, 1853, the Secretary of the Treasury, without any valid reason, and without any right to do so, issued instructions to Richard P. Hammond, the then collector of San Francisco, to abandon said warehouse, and to stop the payment of rent thereon. In pursuance to those instructions, the said Richard P. Hammond, as collector of said port, on the 4th of August, 1853, addressed a letter to your petitioner, advising him that in pursuance to instructions from the Secretary of the Treasury, he should, on the 13th of that month, abandon the building, and should pay no rent thereon after that date. A true copy of which letter is hereto annexed, marked "Exhibit No. 13."

On the 13th of the same month of August your petitioner addressed and delivered to said collector his written answer to said letter of the 4th, in which he informed the collector that he did not recognize the right of the Secretary of the Treasury to rescind said contract, and that he should claim payment of rent pursuant thereto until the expiration of the term for which the building was leased. A true copy of which letter is hereto annexed, marked "Exhibit No. 14."

That said collector, in pursuance to his said letter and of said instructions from the Secretary of the Treasury, did, on said 13th of August, 1853, abandon said building, and has ever since refused to occupy the same or pay rent thereon.

And your petitioner further states that he has spent more than three long years in unavailing efforts to induce the Secretary of the Treasury to revoke said instructions, and allow the arrears of rent to be paid, which the said Secretary has steadily refused, and still does refuse to do.

And your petitioner complains that he has been unjustly subjected to great and ruinous expense in sending agents from California to Washington city to lay his case and his claims before the Secretary of the Treasury; and the repudiation of said lease, by putting it out of his power to meet his engagements, has also brought upon him great and ruinous embarrassment in his business affairs.

That on the 14th of November, 1856, thirty-nine months had elapsed since the payment of any rent on said lease; and that the arrears of rent then and now due to your petitioner amount to the

sum of fifty-eight thousand five hundred dollars, besides the interest, which ought to be allowed thereon.

Your petitioner prays for such relief in the premises as under the circumstances of his case is just and right.

ALEXANDER CROSS,
By S. F. VINTON,
His Counsel.

COPY OF EXHIBITS.

No. 1.—Article of agreement made and concluded this 28th of April, 1849, by and between Daniel Saffarans, of the first part, and the United States of America, by James Collier, collector of the district of San Francisco, California, acting by the direction and authority of William M. Meredith, Secretary of the Treasury, of the second part.

The said party of the first part, for the considerations hereinafter mentioned, doth for him self, his heirs, executors, and administrators, hereby covenant with the said party of the second part that he will well and substantially erect, build, and finish a store or building in said San Francisco, of the dimensions and description hereinafter mentioned, the whole subject to such modifications and alterations as the said collector of San Francisco shall require or approve, to wit: Said store to be four stories high, twenty-five feet wide, and one hundred feet long; to be constructed of iron and brick, so far as may be necessary to make them strictly fire-proof, and to be built in the strongest and most approved manner, the said collector reserving to himself the sole power and privilege of selecting the site or ground upon which said store or stores shall be erected. It is further understood that said collector is to lease said store or stores of said party of the first part for the term of fifteen years; the rent per annum to be determined upon and fixed by the collector at the time said store or stores shall be erected, and received by said collector.

And the said party of the first part doth further covenant that he will erect and finish said store in such manner as the said collector shall require or approve, so that the said store shall be ready for occupancy on or before the first day of September, eighteen hundred and fifty.

And the said party of the first part doth further covenant, that whenever the said store shall be erected and finished and ready for occupancy, to the acceptance of the said collector, he will lease, and he doth hereby lease said store to the said party of the second part, for a term commencing on the day when the said collector shall approve and accept of said store, and terminating on the expiration of the term aforesaid, to wit, fifteen years from the time they are received by said collector, upon the terms and conditions and for the rent hereinafter mentioned.

And the said party of the first part doth further covenant, that the

said store is free from all incumbrances, and that the United States shall not be liable for any lien upon said store during the term aforesaid, or any other claim of any nature whatsoever, except only the rent hereinafter stipulated; and that he will keep the said store in good and sufficient repair, injuries arising from the misconduct of officers of the government only excepted.

And the said party of the second part do hereby covenant with the said party of the first part, his heirs, executors, and administrators, that whenever the said store shall be ready for the occupancy to the acceptance of said collector, they will hire and lease of the said party of the first part the said store, upon the terms and conditions, and for the period hereinafter mentioned; that they will pay rent for said store at the rate of ——— dollars per annum, said rent to be paid quarterly, on the first of January, April, July, and October; and that the said rent on said store shall commence as soon as the same shall be ready for occupancy and accepted by the said collector as aforesaid.

And it is further agreed by the said parties of the first and second parts, that should the said store be destroyed or injured by fire, or the action of any of the elements, so that the same shall become untenable, the said party of the first part shall re-build and repair the same as soon as practicable, and the rent of said store shall cease and remain discontinued during all the time the occupancy of said store shall be interrupted or prevented from the causes aforesaid, or any other cause not arising from the act or default of the Secretary of the Treasury or the collector aforesaid.

In testimony whereof, the said parties to these presents, on the day and year first above written, have hereunto, and to two other copies of the same, interchangeably set their hands and seals—the said party of the first part, in person, and the United States, by James Collier, collector, acting as aforesaid; and Wm. M. Meredith, Secretary of the Treasury, in evidence of the authority aforesaid, and of his approval of the premises, has hereunto affixed his official signature.

DANIEL SAFFARANS. [SEAL.]

JAMES COLLIER, [SEAL.]

Collector of the district of Upper California.

Signed, sealed, and delivered in presence of—

SAM'L S. WYLIE.

N. HEADINGTON.

Exhibit No. 2.—Copy of approval of the Secretary of the Treasury.

The foregoing articles of agreement are approved on the following express reservations and conditions only, to wit:

First. That wherever the name of James Collier, collector of the district of San Francisco, California, is mentioned, or where the words collector or said collector are used, they shall be deemed and understood to mean and apply to the collector of the district aforesaid in his official capacity for the time being.

Second. That this agreement is understood and intended to apply to the construction and renting of *one* store building only, and to no more, unless hereafter deemed necessary, and then rented with the approbation of the Secretary of the Treasury.

Third. The rate of rent to be paid for the building to be agreed upon by the collector, subject expressly to the approval of the Secretary of the Treasury.

Fourth. The rent stipulated for to depend upon and be paid out of appropriations expressly made by Congress for the purpose, and from no other source, or according to the existing laws at the times of payment.

In testimony whereof, I, William M. Meredith, Secretary of the Treasury, have hereunto signed my name, and affixed the seal [L. s.] of the Treasury Department, this eighth day of May, in the year of our Lord one thousand eight hundred and forty-nine.

W. M. MEREDITH,
Secretary of the Treasury.

Copy of Exhibit No. 3.

Know all men by these presents that I, Daniel Saffarans, a resident of the State of Tennessee, have made, constituted, and appointed, and by these presents do make, constitute, and appoint George N. Sanders, of the city of New York, my true and lawful attorney, for me and in my name, place, and stead, for the purposes hereinafter mentioned.

Whereas, on the 28th of April, 1849, articles of agreement were made and concluded by and between me, of the first part, and James Collier, collector of the district of San Francisco, California, acting by the direction and authority of William M. Meredith, Secretary of the Treasury of the United States, of the second part, of which said articles of agreement a certified copy is hereunto annexed ;

And whereas said articles of agreement require me to erect the store or building mentioned in said articles of agreement on or before the first day of September, A. D. 1850 ;

And whereas, in order to fulfil all the requirements of said articles of agreement on the part of the party of the first part, it is necessary that other parties should be interested in the contract made between the parties to said articles of agreement: Therefore I do appoint the said George N. Sanders my true and lawful attorney, with full powers to negotiate a loan or loans of money with any person or persons in the United States of America or elsewhere, for the purpose of completing and fulfilling the contract aforesaid ; said attorney having by these presents full power and authority to associate with himself such person or persons as he may see fit, to carry out the object of the said agreement ; such person or persons as he may select or agree with to have such share of the rents, issues, and profits to arise and grow out of the store or building to be erected as per said agreement, and are not to require the payment of interest on such sums as they may advance until such store or building has been taken possession of by

the United States government or its representative ; and such rent to be paid for such store or building shall be appropriated as it is paid quarterly to the persons who may become interested in said agreement in proportion to their respective shares and interest therein, and as may be agreed upon between them and my attorney hereby appointed. And the said George N. Sanders, in consideration of the labor and trouble he may have in executing the powers herein contained, shall have and receive, and the same is hereby granted and given to him, one-sixth of the whole interest of the party of the first part in said article of agreement and the subject-matter thereof ; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof

In witness whereof, I have hereunto set my hand and seal the seventeenth day of May, in the year one thousand eight hundred and forty-nine.

DANIEL SAFFARANS.

Sealed and delivered in presence of—

Copy of Exhibit No. 4.

Articles of agreement made and entered into this ninth day of January, 1850, between Daniel Saffarans, of Tennessee, of the first part, and Alexander Cross, of Valparaiso, of the second part, witnesseth :

That whereas the party of the first part did enter into a contract on the 28th day of April, 1849, with the collector of the port of San Francisco (approved by the Secretary of the Treasury) for the construction of an iron warehouse, to be used as a government store in said port, on terms and conditions as will more fully appear by reference to said contract ;

And whereas said party of the first part is desirous of associating with him some capitalist who will aid in carrying out said contract ;

And whereas the said party of the second part is willing to unite with the said party of the first part in carrying out that object : Therefore, they have come to the following agreement, to wit :

First. The said Alexander Cross, as senior partner of the commercial houses of Cross, Wedderspoon & Co., of Glasgow, Scotland, and Cross, Hobson & Co., of San Francisco, Upper California, undertakes that they attend to the carrying out of said contract for and in behalf of the contractor ; advancing the capital necessary, in Europe and California, to the extent of fifty thousand dollars, at the rate of ten per centum per annum for interest, risks, losses by exchange, and for services rendered not otherwise provided for ; the same to be

reimbursed in three equal annual instalments, or in two, at the option of Mr. Saffarans, as may hereafter be found convenient to him.

Second. Cross agrees, on behalf of his Glasgow firm, to attend to the orders of said Saffarans, or his attorney in New York, in procuring the construction of one or more iron warehouses, in the best manner and on the best terms, and to forward the same with all speed to San Francisco, covering the same by the necessary insurance, their commission being limited to five per cent. on invoice; said orders to be accompanied by a remittance of one-sixth the approximate amount.

Third. Cross engages, on behalf of his San Francisco house, to make the necessary entries, pay the duty, and land said warehouses, and superintend in a general way their erection, previously buying or securing the necessary ground or site, with the corresponding approval of the collector of the custom-house, (as stipulated in contract,) their commission on said land and buildings being limited to five per cent.

Fourth. He further engages that his said California firm shall lease, on proper terms, the said warehouses to the collector, collect the rents at the proper times, and keep an account of the same; that they sell such spare lands as may not be required for the purposes of the contract; their commission agency in both cases being limited to five per cent.

Fifth. The interest or shares of this contract are declared by Saffarans to be divided into one hundred; of which Cross, as advancing capitalist, is assigned hereby twenty-seven and two thirds shares, ($27\frac{2}{3}$.) the contractor representing seventy-two and one third shares, ($72\frac{1}{3}$.)

Sixth. The whole accounts to be kept and made up in San Francisco, the cost of grounds and erections being capitalized when completed, and proceeds of rents collected, or spare lands sold credited. Then yearly make up the same, and after setting aside and repaying to the advancers the stipulated annual instalments, account with the parties interested for surplus or deficiency.

Seventh. Saffarans agrees to extend to said Cross, Hobson & Co., of San Francisco, his full power of attorney as his sole agents in California respecting this contract, to be irrevocable and continued for at least two years, and until all the advances are liquidated; any change which the major part of those interested may deem necessary in the agency afterwards, Mr. Saffarans will be at liberty to make.

Eighth. Cross, on behalf of his California house, agrees to give the preference of such iron houses which they, meantime, have to their address, of a suitable character for this contract, on reasonable terms; more particularly one of two stories sent to Valparaiso, per Favorite, from London in July last, if not previously engaged, and Mr. Saffarans agrees to purchase such at the market price, which can hereafter be determined to his satisfaction.

It is further understood that said Saffarans is to pay one-sixth of the cost of the building herein referred to, or of any others that may be constructed under this contract, payable in three and six months from time of notice of contract for their construction. The money to be advanced by said Saffarans is to represent five and two-thirds shares, and to be refunded in same manner as the moneys advanced by said Cross, said five and two-thirds shares to be placed on precisely

the same footing of the twenty-seven and two-thirds shares of said Cross.

Witness the hands and seals of the parties the day and date above mentioned.

DANIEL SAFFARANS. [SEAL]
By his attorney, GEO. N. SANDERS. [SEAL.]

Witnesses:

ALFRED GILMORE.

A. J. OGLE.

SAMUEL B. HART.

Explanatory note.—The capital provided by advances, for present, is \$60,000, to the whole of which $33\frac{1}{3}$ shares are assigned. To Cross, therefore, who puts \$50,000, corresponds $27\frac{2}{3}$; and to Saffarans \$10,000, $5\frac{2}{3}$.

Ready cash is understood and is requisite for the purpose of the contract, both in Europe and in California, and should be provided so by Mr. Saffarans for his share, as per article; but if in negotiable paper, at three and six months, he to pay interest at 10 per cent. per annum. In case of any defection in either advancing parties, the shares will be hereafter modified on the above principle.

ALEX. CROSS.

Copy of Exhibit No. 5.

Articles of agreement entered into this 11th day of November, 1850, between T. Butler King, collector of the port of San Francisco, for and on behalf of the United States government, of the first part, and Daniel Saffarans, of Tennessee, of the second part, witnesseth:

That whereas the party of the second part did, on the 28th day of April, 1849, enter into a contract with James Collier (then collector of the port of San Francisco) for the construction of an iron fire-proof warehouse, twenty five feet wide by one hundred feet deep, and four stories high, to be used for custom-house purposes at said port of San Francisco, under a lease to the government for the term of fifteen years, which said contract was approved by Wm. M. Meredith, (the Secretary of the Treasury,) on the 8th day of May, 1849, on conditions as expressed in said approval, and among others the following: "The rate of rent to be paid for the building to be agreed upon by the collector, subject expressly to the approval of the Secretary of the Treasury;"

And whereas the party to the second part to this agreement, in fulfilment of his contract with the said James Collier, has erected an iron fire-proof warehouse in San Francisco, of the dimensions and quality as stipulated for;

And whereas said Collier, as collector, did, on the — day of —, contract with the party of the second part to this agreement to rent said warehouse for a term of fifteen years, at the rate of two thousand dollars per month, which said contract was sent on to Washington city for the approval of the Secretary of the Treasury;

And whereas, the present Secretary of the Treasury, deeming the rate of rent for the term of fifteen years to be unreasonable, has disapproved of said contract of the _____ day of _____; but the government of the United States being much in need of said iron warehouse, for custom-house purposes in San Francisco, and said Saffarans being willing to make some abatement in the terms agreed on in the contract entered into with the said Collier on the _____ day of _____, the parties to this agreement have concluded the following terms:

The party of the first hereby agrees to rent said warehouse from the party of the second part for the term of ten years, from the day possession shall be delivered to the present collector, at a rent of fifteen hundred dollars per month, payable monthly by the collector of San Francisco. And the party of the second part doth hereby further covenant that said store is free from all incumbrances, and that the United States shall not be liable for any lien upon said store during the term aforesaid, or any other claim of any nature whatsoever, except only the rent herein stipulated to be paid, and that he will keep said store in good and sufficient repair, injuries arising from the misconduct of the officers of the government only excepted.

And it is further agreed by the parties of the first and second part, that should said store be destroyed or injured by the action of any of the elements, so that the same shall become untenable, the said party of the second part shall rebuild or repair said store as soon as practicable, and the rent of said store shall cease and remain discontinued during all the time the occupancy shall be interrupted from the causes aforesaid, or any other cause not arising from the act or default of the officers of the government.

In testimony whereof, the parties to this agreement have respectively hereunto set their hands and affixed their seals the day and year before written.

T. BUTLER KING, [SEAL.]
Collector of the port of San Francisco.
 DANIEL SAFFARANS. [SEAL.]

Copy of Exhibit No. 6.

The foregoing articles of agreement are approved upon the following express understanding and conditions, that is to say:

That the collector, T. Butler King, esq., upon his arrival at San Francisco, shall first examine the warehouse in question, and duly accept the same as being substantially of the character, description, and dimensions required by the stipulations contained in the former articles of agreement herein referred to, then this approval is to take effect, otherwise to be null and void.

THOMAS CORWIN,
Secretary of the Treasury.

Copy of Exhibit No. 7.

I, as collector of the port of San Francisco, do hereby accept the iron warehouse erected by Alexander Cross upon a part of the water lot No. 49, on Battery street, now in the occupancy of the United States government as a bonded warehouse, contracted to be built by Daniel Saffarans, as provided in a contract of which the within is a copy.

And I do hereby officially recognize said Cross as landlord; it being understood that I am to incur no individual responsibility in the premises. This acceptance to date as if done 14th of January, 1851.

T. BUTLER KING,

As Collector of the port of San Francisco.

Copy of Exhibit No. 8.

Having sold to Alexander Cross, for a valuable consideration, all my interests herein mentioned, I, Daniel Saffarans, do hereby transfer and assign the agreement of which the foregoing instrument is, in substance, a copy, with all the rights, rents, and interests accrued, or to accrue, under or in virtue of the same, to Alexander Cross, hereby placing him, to all intents and purposes, in my stead as regards said agreement, as though he instead of myself had been the original party thereto, he taking all the benefits of said agreement, and all its responsibilities. And I do release, quit-claim, and convey all my right, title, interest, and lien, if any, and whatever it may be, to the said Cross and his heirs forever.

The said Cross is hereby entitled and authorized to receive all the rent that has accrued and is now in arrear, or that may hereafter accrue under said agreement, for the house therein mentioned and alluded to.

In testimony whereof, I have hereunto set my hand and seal this 10th day of July, 1851.

DANIEL SAFFARANS. [SEAL.]

Signed, sealed, and acknowledged in presence of the undersigned witnesses:

H. M. LUSHER.

C. G. LEONARD.

JAMES ROSE, jr.

Copy of endorsement on the above.

It is agreed that this transfer will not be valid until R. H. Crittenden, Isaac Saffarans, and A. P. Sheldon endorse on it their approval. This 10th July, 1851.

DANIEL SAFFARANS.

Exhibit No. 9.

Know all men by these presents, that I, Daniel Saffarans, of the town of Memphis, in the State of Tennessee, do hereby nominate, constitute, and appoint Robert H. Crittenden, Isaac Saffarans, and A. P. Sheldon, my true and lawful attorneys in fact, for me and in my name to deliver to Alexander Cross, of San Francisco, in California, my assignment to said Cross of all my right, title, and interest in and to an iron warehouse in San Francisco, together with all rents accrued or to accrue on the same, as are more particularly set forth in my said assignment bearing date of the 1st of July, 1851, and attached to a certified copy of my contract of the 11th November, 1850, with T. Butler King, collector of San Francisco, for the rent of said house, &c.

And my said attorneys are also hereby fully authorized and empowered to receipt for and receive from said Cross all money, bonds, or notes stipulated to be received by me, as the consideration for said assignment, and to take from said Cross a release of all responsibility on my part arising out of any and all contracts heretofore made between us in relation to the building or renting of said house.

And my said attorneys are also hereby fully authorized and empowered, if any objection is made to the form of my said assignment or its mode of authentication, to alter and amend the same at their discretion, or in fact to make any new or other assignment for me.

And my said attorneys are also hereby fully empowered and authorized to substitute another attorney in their places, with the same full powers in the premises as are hereby conferred on them, hereby binding and obliging myself to ratify and confirm whatever my said attorneys or those substituted may do in the premises, and making their acts as binding on me as if done by myself.

DANIEL SAFFARANS. [SEAL]

Signed, sealed, and acknowledged, in presence of the undersigned witnesses:

H. M. LUSHER.

C. G. LEONARD.

JAMES ROSE, jr.

Copy of Exhibit No. 10.

NEW YORK, *July 25, 1851.*

Know all men by these presents, that I, R. H. Crittenden, of Frankfort, Kentucky, do hereby nominate, constitute, and appoint George W. Guthrie, of the city of San Francisco, California, my true and lawful attorney in fact, to act for me under the foregoing joint power of attorney from Daniel Saffarans to Isaac Saffarans, A. P. Sheldon, and myself, with power of substitution, hereby authorizing the said Guthrie to exercise all the rights and powers which I myself could do under the said power of attorney from said Daniel Saffarans, binding myself to approve whatever the said Guthrie may do in the premises,

making his acts as binding as if done by me. Witness my hand and seal.

R. H. CRITTENDEN. [SEAL.]

Signed and sealed in presence of—

GEORGE N. SANDERS.

JAMES ELDREDGE.

Exhibit No. 11.

Know all men by these presents, that I, A. P. Sheldon, of Sumner county, in the State of Tennessee, recently of San Francisco, in the State of California, have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint, Isaac Saffarans, B., of San Francisco aforesaid, my true and lawful attorney in fact, for me and in my name and stead to endorse my name and approval upon a certain deed of conveyance executed by Daniel Saffarans, of Shelby county, Tennessee, to Alexander Cross, of England, now in San Francisco, about the month of June, 1851, whereby the said Daniel Saffarans conveyed to said Cross an iron fire-proof warehouse of four stories, erected by said Cross in the city of San Francisco aforesaid; which said warehouse is now occupied by the government of the United States, under a lease from the said Daniel Saffarans, for custom-house purposes, it being now impracticable for me, in the absence of papers relating to the same, to describe the property conveyed by said deed with more minuteness and precision; which said deed was sent to California by the said Saffarans as an escrow, to take effect as a deed, upon condition that the same should be approved and endorsed by Robert Crittenden, the said Isaac Saffarans, B., and myself; and the same has been approved and endorsed by the said Robert Crittenden, by George W. Guthrie, his attorney in fact, and by the said Isaac Saffarans, B., and would have been approved and endorsed by myself in person had I not left California before the said deed arrived there.

And I hereby engage to ratify and confirm the approval and endorsement of the said deed by my said attorney in fact, as fully and amply as though the same were done by myself in proper person.

In testimony whereof, I have hereunto set my hand and affixed my seal, this 19th day of November, 1851.

A. P. SHELDON. [SEAL.]

Exhibit No. 12.

SAN FRANCISCO, *September 15, 1851.*

SIR: Having assigned and transferred to Alexander Cross within contract, you will please pay all back and future rents arising under the same to said Alexander Cross.

I remain, very respectfully, sir, your obedient servant,

DANIEL SAFFARANS,

Per Att'y, ISAAC SAFFARANS, B.

Hon. T. BUTLER KING,

Collector of the port of San Francisco.

Copy of Exhibit No. 13.

CUSTOM-HOUSE, SAN FRANCISCO,
Collector's Office, August 4, 1853.

SIR: I have the honor to inform you that in obedience to instructions which I have received from the Secretary of the Treasury, under date of April 12, 1853, that the "pretended lease" under which the warehouse belonging to you, on Battery street, has been occupied for the storage of goods by the United States, "is not binding on the United States," and that I am to abandon that building. I shall, on the thirteenth instant, give up the possession of the said store, and not pay any rent for it after that date.

Respectfully, your obedient servant,

RICHARD P. HAMMOND,
Collector.

ALEX. CROSS, Esq.

Copy of Exhibit No. 14.

SAN FRANCISCO, *August 13, 1853.*

SIR: I have to acknowledge the receipt of a letter from you, under date August 4, apprising me that in obedience to instructions from the Secretary of the Treasury you will, on the 13th instant, give up the possession of my warehouse on Battery street, and not pay any rent for it after that date.

I do not recognize a right in the Secretary of the Treasury to rescind my contract with the government in reference to said warehouse, and I shall therefore claim payment of rent, pursuant to said contract, until the expiration of the term for which the building was leased.

Respectfully, your obedient servant,

ALEX'R CROSS.

RICHARD P. HAMMOND, Esq.,
Collector of Customs.

DR.

The United States in account with Alexander Cross.

CR.

1856. Nov. 14	To rent of iron warehouse on Battery street, San Francisco, from the 13th of August, 1853, to the 14th of November, 1856, equal 39 months, at \$1,500 per month, as per lease of 11th of November, 1850, (<i>vide</i> exhibit No. 5, page 14 of printed petition)-----		1854. Sept. 1	By rent of entire store, received from F. S. Alvarez, from September 18, 1853, to September, 1, 1854, equal 12 months, at \$750 per month, less 5 per cent. for collection, (<i>vide</i> deposition of Joseph Clarke)-----	\$8,550 00
		\$58,500 00	1856. Nov. 11	By rent of three-fourths of ground floor, received from J. J. Southgate & Co., from the 10th of August, 1855, to the 10th of November, 1856, at \$100 per month, less 5 per cent. for collection, (<i>vide</i> deposition of Henry Lund and Joseph Clarke)-----	1,425 00
			14	By storage received from September 1, 1854, to November 14, 1856, less 5 per cent. for collection, as per deposition of Lund and Clarke, and account attached to Lund's deposition-----	4,917 37
				By balance -----	43,607 63
		58,500 00			58,500 00
Nov. 14	To balance due A. Cross this date, exclusive of interest -----	\$43,607 63			

A.

The claim would be for ninety-two months.....	\$46,000
The proportion of the gales past due is up to April 13, 1856— $\frac{32}{92}$ of.....	\$46,000
And the proportion is therefore exactly.....	16,000
On which interest is to be cast up to the 13th April, 1856—thirty-two months half the time, or one year four months, or 8 per cent. on...	16,000 8
	128,000
	100
Sixty months from April 14 to end of lease, or precisely five years on which interest is to be deducted on the gales to fall due, which amount to the sum of \$30,000; on which interest is to be deducted for one-half the time, being 15 per cent.....	30,000 15
	150,000
	30,000
	450,000
	100
Therefore, to the sum of.....	\$46,000
Add interest on the gales for thirty-two months	1,280
As above.....	47,280
And deduct the interest as above for one-half of five years, being $2\frac{1}{2} \times 6 = 15$	4,500
Leaves due to Mr. Cross.....	42,780

B.

[C is a calculation, &c., on the same principle, the loss estimated at \$500 per month]

Average of the years separately, supposing the payments to be made monthly.

One year. The amount payable in one year is, at \$750	
per month.....	\$9,000 00
Interest on \$750 for 12 months at 6 per cent.....	\$45 00
Interest on \$750 for 11 months at 6 per cent.....	41 25
Interest on \$750 for 10 months at 6 per cent.....	37 50
Interest on \$750 for 9 months at 6 per cent.....	33 75
Interest on \$750 for 8 months at 6 per cent.....	30 00
Interest on \$750 for 7 months at 6 per cent.....	26 25
Interest on \$750 for 6 months at 6 per cent.....	22 50
Interest on \$750 for 5 months at 6 per cent.....	18 75
Interest on \$750 for 4 months at 6 per cent.....	15 00
Interest on \$750 for 3 months at 6 per cent.....	11 25
Interest on \$750 for 2 months at 6 per cent.....	7 50
Interest on \$750 for 1 month at 6 per cent.....	3 75
	292 50
	====

But from the above we must deduct $\frac{1}{13}$ part, since interest is not payable until the *expiration* of a month, and the above table is constructed on the supposition of its being paid *in advance*, and comprehends, in reality, 13 months instead of twelve: Therefore the above sum is to be divided by 13, and the amount so found subtracted, and then the real amount paid and payable will appear—

$$\begin{array}{r}
 13)292\ 50(22\ 50 \\
 \underline{26} \\
 32 \\
 \underline{26} \\
 65 \\
 65 \\
 \underline{} \\
 0 \\
 \underline{}
 \end{array}$$

From \$292 50
Deduct 22 50

Leaves 270 00—actual interest paid in 12 months, when money is legally payable at the end of each month and there is a failure to pay it.

C.

This paper is a calculation of interest, &c., averaging the years separately, supposing the sum to be \$500 per month. In the paper B herewith the sum is \$750. As \$500 per month is the loss supposed in 92 months, and consequently makes up the sum in that time of \$46,000; it is proper to make an average of the years *separately* on that estimate. The principles applied are the same as in paper B.

Interest on \$500 for 12 months, at 6 per cent. per annum.....	\$30 00
For 11 months, at 6 per cent. per annum	27 50
For 10 months, at 6 per cent. per annum.....	25 00
For 9 months, at 6 per cent. per annum.....	22 50
For 8 months, at 6 per cent. per annum.....	20 00
For 7 months, at 6 per cent. per annum.....	17 50
For 6 months, at 6 per cent. per annum.....	15 00
For 5 months, at 6 per cent. per annum.....	12 50
For 4 months, at 6 per cent. per annum.....	10 00
For 3 months, at 6 per cent. per annum.....	7 50
For 2 months, at 6 per cent. per annum.....	5 00
For 1 month, at 6 per cent. per annum.....	2 50
	13)195 00(15
	13
	65
	65

From this sum one-thirteenth is to be deducted for the same reason assigned in paper B, the table being in each case constructed on the same principle.

From \$195
Deduct 15

Leaves 180 actual interest payable on \$6,000 in twelve months, when money is legally payable at the end of each month, and there is a failure so to pay it,

Verification of the calculations of interest in paper B by the rule and calculation in this paper C.

Proportion of the gales past due up to 13th April, 1856,
 $\frac{3}{2}$ of \$46,000.—(See paper A)..... \$16,000

Interest then stated to be due on it..... 1,280

The money is payable monthly \$500. \$6,000 per year and the whole therefore is payable in two years eight months. Upon the calculation in this paper C, p. I, it will be paid as follows:

1st year of the first six thousand, payable monthly.. .	\$180
2d year. This entire six thousand is all due from the commencement of the year, and therefore full interest is chargeable on it for that whole year.....	360
3d year. The same observation is true of this \$6,000 in respect to the last eight months, but the full interest for eight months is but.....	240
Being two-thirds of the full interest for a year. On the second six thousand, half interest is due the year in which it is payable monthly, as in the first.....	180
And full interest in the third year for the time, only eight months, in that year.....	240
On the \$4,000 payable in eight months in the second year, but \$240 would be due for twelve months, and eight months is two-thirds of twelve and gives \$160 as full interest; but as this is payable, like the \$12,000 preceding, monthly, it being the first and only part of a year in which it falls due, the interest chargeable on it is the half of \$160.....	80
	1,280

Interest calculation verified as per the calculation of interest on the \$16,000 in paper A.

Interest calculation verified as in paper A, on the \$30,000 on which interest is to be deducted. As in the case of the \$16,000, the money is payable monthly, \$500 each month. Interest therefore will be the same for the same time and amount, but the sum is larger and the time longer; amount and time are the constituents of interest, according to which the same rate of interest will bring varying amounts.

Interest in paper A, stated to be due on the \$30,000	\$4,500
\$6,000 per year, and the whole is payable in five years.	
1st year of the first \$6,000	\$180
But it has four (4) full years to run on interest, inasmuch as the whole sum is to be paid in anticipation.	
Four full year's interest, is $\$360 \times 4 =$	1,440
2d \$6,000, first year.....	180
Which has three years more of full interest $\$360 \times 3 =$	1,080
3d year's \$6,000 monthly.....	180
2 years at full interest.....	720
4th year's \$6,000 monthly.....	180
And one year (the 5th) of entire interest.....	360
5th year's \$6,000 is but monthly, as the time (5 years) then expired; therefore only this sum is chargeable on it	180
As in paper A.....	4,500

Therefore the result is the same as in paper A, viz :

Amount as in the Secretary's letter.....	\$46,000
Add amount of interest verified in this paper.....	1,280
	47,280
Deduct the amount of interest to be deducted from the gales to fall due.....	4,500
Leaves due to Mr. Cross.....	42,780

In paper A the same sum as made out by a different mode of calculation, but the same in principle.

Very respectfully,

WM. ANDERSON.

IN THE COURT OF CLAIMS.

ALEXANDER CROSS *vs.* THE UNITED STATES.

It is agreed that the paper marked thus, (Paper No. 1,) and put on file in this case, is a true copy of the original agreement between Daniel Saffarans of the first part, and the United States of America by James Collier, collector of the district of San Francisco, California, of the second part, and of the approval of said agreement by W. M. Meredith, Secretary of the Treasury.

That the paper marked thus, (Paper No. 2,) and also put on file in this case, contains true copies of the originals of the following enumerated papers, to wit :

1. A copy of the article of agreement of the 11th of November, 1850, between T. Butler King, collector of the port of San Francisco, for and on behalf of the United States government of the first part, and Daniel Saffarans of the second part.

2. A copy of the approval of the last named article of agreement, by Thomas Corwin, Secretary of the Treasury, endorsed on said original article of agreement.

3. A copy of the assignment of said last named article of agreement, by said Daniel Saffarans, to Alexander Cross, the plaintiff in this case.

4. A copy of the approval of said assignment, by R. H. Crittenden, A. P. Sheldon, and Isaac Saffarans, B., as the attorneys of the said Daniel Saffarans, endorsed on said assignment.

5. A copy of the letter of said Daniel Saffarans, by his attorney, Isaac Saffarans, B., of the date of the 15th of September, 1851, addressed to T. Butler King, collector of the port of San Francisco, notifying him that the said article of agreement of the 11th of November, 1850, had been assigned to said Alexander Cross, and requesting him to pay all back and future rents to said Cross.

6. A copy of the acceptance by said T. Butler King, as collector of the port of San Francisco, of the iron warehouse named in said article

of the 11th of November, A. D. 1850, and of his official recognition of said Alexander Cross as the landlord to whom the rents of said warehouse were to be paid.

It is agreed that the paper marked thus, (Paper No. 3,) and also put on file in this case, is the original letter of Richard P. Hammond, collector of San Francisco, to Alexander Cross, notifying him that in pursuance to instructions from the Secretary of the Treasury, he should, on the 13th of August, 1853, abandon said warehouse, and stop the payment of rent from that date.

M. BLAIR,
Solicitor United States.
S. F. VINTON
For ALEX. CROSS.

JUNE 4, 1857.

Articles of agreement made and concluded this twenty-eighth day of April, in the year eighteen hundred and forty-nine, by and between Daniel Saffarans of the first part, and the United States of America, by James Collier, collector of the district of San Francisco, California, acting by the direction and authority of William M. Meredith, Secretary of the Treasury, of the second part:

The said party of the first part, for the considerations hereinafter mentioned, doth, for himself and his heirs, executors, and administrators, hereby covenant with the said party of the second part, that he will well and substantially erect, build, and finish a store or building in said San Francisco of the dimensions and description hereinafter mentioned, the whole subject to such modifications and alterations as the said collector of San Francisco shall require or approve, to wit: said store to be four stories high, twenty-five feet wide, and one hundred feet long, to be constructed of iron and brick, so far as may be necessary to make them strictly fire-proof, and to be built in the strongest and most approved manner; the said collector reserving to himself the sole power and privilege of selecting the site or ground upon which said store or stores shall be erected. It is further understood that said collector is to lease said store or stores of said party of the first part for the term of fifteen years. The rent per annum to be determined upon and fixed by the collector at the time said store or stores shall be erected and received by said collector.

And the said party of the first part doth further covenant that he will erect and finish said store in such manner as the said collector shall require or approve; so that the said store shall be ready for occupancy on or before the first day of September, eighteen hundred and fifty.

And the said party of the first part doth further covenant that whenever the said store shall be erected and finished and ready for occupancy, to the acceptance of the said collector, he will lease and he doth hereby lease the said store to the said party of the second part for a term commencing on the day when the said collector shall

approve and accept of said store, and terminating on the expiration of the term aforesaid, to wit: fifteen years from the time they are received by said collector, upon the terms and conditions and for the rent hereinafter mentioned.

And the said party of the first part doth further covenant that the said store is free from all incumbrance, and that the United States shall not be liable for any lien upon said store during the term aforesaid, or any other claim of any nature whatsoever, except only the rent hereinafter stipulated, and that he will keep the said store in good and sufficient repair, injuries arising from the misconduct of officers of government only excepted.

And the said party of the second part do hereby covenant with the said party of the first part, his heirs, executors, and administrators, that whenever the said store shall be ready for the occupancy, to the acceptance of the said collector, they will hire and lease of the said party of the first part the said store upon the terms and conditions and for the period herein mentioned, that they will pay rent for the said store at the rate of ——— dollars per annum; said rent to be paid quarter-yearly on the first of January, April, July, and October, and that the said rent on said store shall commence as soon as the same shall be ready for occupancy and accepted by the said collector as aforesaid.

And it is further agreed by the said parties of the first and second parts that, should the said store be destroyed or injured by fire or the action of any of the elements, so that the same shall become untenable, the said party of the first part shall rebuild and repair the same as soon as practicable; and the rent of said store shall cease and remain discontinued during all the time the occupancy of said store shall be interrupted or prevented from the causes aforesaid, or any other cause not arising from the act or default of the Secretary of the Treasury or the collector aforesaid.

In testimony whereof the said parties to these presents on the day and year first above written have hereunto and to two other copies of the same, interchangeably set their hands and seals, the said party of the first part in person, and the United States by James Collier, collector, acting as aforesaid; and William M. Meredith, Secretary of the Treasury, in evidence of the authority aforesaid and of his approval of the premises, has hereunto affixed his official signature.

DANIEL SAFFARANS. [L. S.]

JAMES COLLIER, [L. S.]

Collector of the District of Upper California.

Signed, sealed, and delivered in presence of—

SAMUEL T. WYLIE.

N. HEADINGTON.

STATE OF OHIO, }
Hamilton County, } ss.

Personally appeared before me the undersigned, a notary public in and for the county and State aforesaid, on this twenty-eighth day of April, A. D. eighteen hundred and forty-nine, Daniel Saffarans and

James Collier, the parties to the foregoing instrument, and severally acknowledged the same to be their voluntary act and deed, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my [L. s.] notarial seal, this twenty-eighth day of April, eighteen hundred and forty-nine.

SAMUEL T. WYLIE,
Notary Public.

The foregoing articles of agreement are approved, on the following express reservations and conditions only, to wit: First. That wherever the name of James Collier, collector of the district of San Francisco, California, is mentioned, or where the words collector or said collector are used, they shall be deemed and understood to mean and apply to the collector of the district aforesaid in his official capacity for the time being.

Second. That this agreement is understood and intended to apply to the construction and renting of *one* "store or building" only, and to no more, unless hereafter deemed necessary, and then rented with the approbation of the Secretary of the Treasury.

Third. The rate of rent to be paid for the building to be agreed upon by the collector, subject expressly to the approval of the Secretary of the Treasury.

Fourth. The rent stipulated for to depend upon and be paid out of appropriations expressly made by Congress for the purpose, and from no other source, or according to the existing laws at the times of payment.

In testimony whereof, I, William M. Meredith, Secretary of the Treasury, have hereunto signed my name and affixed the seal [L. s.] of the Treasury Department this eighth day of May, in the year of our Lord one thousand eight hundred and forty-nine.

W. M. MEREDITH,
Secretary of the Treasury.

I, William M. Meredith, Secretary of the Treasury, do hereby certify the within to be a correct and true copy of the original on file in this department.

In witness whereof I have hereunto signed my name and affixed the [L. s.] seal of the Treasury Department this tenth day of May, in the year of our Lord one thousand eight hundred and forty-nine.

W. M. MEREDITH,
Secretary of the Treasury.

Know all men by these presents, that I, Daniel Saffarans, a resident of the State of Tennessee, have made, constituted, and appointed, and by these presents do make, constitute, and appoint George N. Sanders, of the city of New York, my true and lawful attorney for me

and in my name, place, and stead, for the purposes hereinafter mentioned: Whereas, on the eighth day of April, in the year eighteen hundred and forty-nine, articles of agreement were made and concluded by and between me, of the first part, and James Collier, collector of the district of San Francisco, California, acting by the direction and authority of William M. Meredith, Secretary of the Treasury of the United States, of the second part, of which said articles of agreement a certified copy is hereunto annexed; and whereas, said articles of agreement require me to erect the store or building mentioned in said articles of agreement on or before the first day of September, eighteen hundred and fifty; and whereas, in order to fulfill all the requirements of said articles of agreement on the part of the party of the first part, it is necessary that other parties should be interested in the contract made between the parties to the said articles of agreement; therefore I do appoint the said George N. Sanders my true and lawful attorney, with full power to negotiate a loan or loans of money with any person or persons in the United States of America or elsewhere, for the purpose of completing and fulfilling the contract aforesaid; said attorney having, by these presents, full power and authority to associate with himself such person or persons as he may see fit, to carry out the object of the said agreement; such person or persons as he may select or agree with to have such share of the rents, issues, and profits to arise and grow out of the store or building to be erected as per said agreement, and are not to require the payment of interest on such sums as they may advance until such store or building has been taken possession of by the United States government or its representative, and such rent as may be agreed upon by the parties named in said articles of agreement shall have been paid, that is to say, that the rent to be paid for such store or building shall be appropriated, as it is paid quarterly, to the persons who may have become interested in said agreement, in proportion to their respective shares and interest therein, and as may be agreed upon between them and my attorney hereby appointed. And the said George N. Sanders, in consideration of the labor and trouble he may have in executing the powers herein contained, shall have and receive, and the same is hereby granted and given him, one-sixth of the whole interest of the party of the first part in said article of agreement and the subject-matter thereof, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do, if personally present with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal this seven-[L. S.]
teenth day of May, in the year one thousand eight hundred and forty-nine.

DAN'L SAFFARANS.

Sealed and delivered in presence of—

AND'W STRAHAN.

STATE OF NEW YORK, }
 City and County of New York. } ss.

On this seventeenth day of May, 1849, before me came personally Daniel Saffarans, to me known to be the person described in and who executed the above power of attorney, and acknowledged to me that he had executed the same.

DAN. MARVINE.

Commissioner of Deeds for the City and County of New York.

UNITED STATES OF AMERICA,
 Treasury Department, May 8, 1856.

Pursuant to the act of Congress of 22d February, 1849, I hereby certify that the annexed is a true copy of the original which is now on file in this department.

In witness whereof I have hereunto set my hand, and caused
 [L. S.] the seal of the Treasury Department to be affixed, on the day
 and year first above written.

JAMES GUTHRIE,
Secretary of the Treasury.

ORIGINAL LEASE.

Articles of agreement entered into this 11th day of November, in the year eighteen hundred and fifty, between T. Butler King, collector of the port of San Francisco for and on behalf of the United States government, of the first part, and Daniel Saffarans, of Tennessee, of the second part, witnesseth :

That whereas the party of the second part did, on the 28th day of April, 1849, enter into a contract with James Collier (then collector of the port of San Francisco) for the construction of an iron fire-proof warehouse twenty-five feet wide by one hundred feet deep and four stories high, to be used for custom-house purposes at said port of San Francisco, under a lease to the government for the term of fifteen years, which said contract was approved by William M. Meredith (then Secretary of the Treasury) on the 8th day of May, 1849, on conditions as expressed in said approval, and among others the following: "The rate of rent to be paid for the building to be agreed upon by the collector, subject expressly to the approval of the Secretary of the Treasury."

And whereas the party of the second part to this agreement, in fulfillment of his contract with the said James Collier, has erected an iron fire-proof warehouse in San Francisco of the dimensions and quality as stipulated for, and whereas said Collier, as collector, did, on the day of contract with the party of the second part to this agreement to rent said warehouse for a term of fifteen years at the rate of two thousand dollars per month, which said contract was sent on to Washington city for the approval of the Secretary of the

Treasury, and whereas the present Secretary of the Treasury deeming the rate of rent for the term of fifteen years to be unreasonable, has disapproved of said contract of the day of .

But the government of the United States being much in need of said iron warehouse for custom-house purposes in San Francisco, and said Saffarans being willing to make some abatement of the terms agreed on in the contract entered into with the said Collier on the day of , the parties to this agreement having concluded the following terms :

The party of the first part hereby agrees to rent said warehouse from the party of the second part for the term of ten years from the day possession shall be delivered to the present collector, at a rent of fifteen hundred dollars per month, payable monthly by the collector of San Francisco ; and the party of the second part doth hereby further covenant that said store is free from all incumbrances, and the United States shall not be liable for any lien upon said store during the term aforesaid, or any other claim of any nature whatsoever, except only the rent herein stipulated to be paid, and that he will keep said store in good and sufficient repair, injuries arising from the misconduct of the officers of the government only excepted.

And it is further agreed by the parties of the first and second part that should said store be destroyed or injured by the action of any of the elements so that the same shall become untenable, the said party of the second part shall rebuild or repair said store as soon as practicable, and the rent of said store shall cease and remain discontinued during all the time the occupancy shall be interrupted from the causes aforesaid or any other cause not arising from the act or default of the officers of the government.

In testimony whereof the parties to this agreement have respectively hereunto set their hands and affixed their seals the day and year before written.

T. BUTLER KING, [L. s.]

Collector of the port of San Francisco.

DANIEL SAFFARANS, [L. s.]

The foregoing articles of agreement are approved upon the following express understanding and conditions, that is to say : That the collector, T. Butler King, esq., upon his arrival at San Francisco, shall first examine the warehouse in question, and duly accept the same as being substantially of the character, description, and dimensions required by the stipulations contained in the former articles of agreement herein referred to ; then this approval is to take effect ; otherwise to be null and void.

THOMAS CORWIN,

Secretary of the Treasury.

TREASURY DEPARTMENT,

Register's Office, June 19, 1851.

I certify the foregoing articles of agreement are true copies of the originals on file in this department.

TOWNSEND HAINES, *Register.*

Having sold to Alexander Cross, for a valuable consideration, all my interests hereafter mentioned, I, Daniel Saffarans, do hereby transfer and assign the agreement, of which the foregoing instrument is, in substance, a copy, with all the rights, rents, and interests, accrued or to accrue under or in virtue of the same, to Alexander Cross, hereby placing him, to all intents and purposes, in my stead, as regards said agreement, as though he instead of myself, had been the original party thereto, he taking all the benefits of said agreement and all its responsibilities; and I do release, quit claim, and convey all my right, title, interest, and lien, if any, and whatever it may be, to the said Cross and his heirs forever. The said Cross is hereby entitled and authorized to receive all the rent that has accrued and is now in arrears, or that may hereafter accrue under said agreement, for the house therein mentioned and alluded.

In testimony whereof, I have hereunto set my hand and seal, this 10th day of July, eighteen hundred and fifty-one.

DAN'L SAFFARANS. [SEAL.]

Signed, sealed, and acknowledged in presence of the undersigned witnesses

H. M. LUSHER.

O. G. LEONARD.

JAMES ROSE, jr.

It is agreed that this transfer will not be valid until R. H. Crittenden, Isaac Saffarans, and A. P. Sheldon endorse on it their approval, this 10th of July, 1851.

DAN'L SAFFARANS.

STATE OF TENNESSEE, }
Shelby County, } ss.

Personally appeared before me, James Rose, a duly commissioned and sworn notary public in and for said county, Daniel Saffarans, the bargainor above named, with whom I am personally acquainted, who acknowledged the execution of the foregoing transfer and assignment, for the purposes therein contained.

Witness my hand and the impress of my seal of office at Memphis, [L. s.] in said county, this 10th day of July, 1851.

JAMES ROSE, *Notary Public.*

[Endorsed.]

SAN FRANCISCO,
September 15, 1851.

SIR: Having assigned and transferred to Alexander Cross within contract, you will please pay all back and future rents arising under the same to said Alexander Cross.

I remain, very respectfully, sir, your obedient servant,

DANIEL SAFFARANS,

Per attorney, ISAAC SAFFARANS, B.

Hon. T. BUTLER KING,

Collector of the Port of San Francisco.

The undersigned signifies his approval to the within transfer by affixing hereto his hand and seal, this twenty-sixth day of January, one thousand eight hundred and fifty-two.

A. P. SHELDON, [SEAL.]
Per ISAAC SAFFARANS, B,
His Attorney in fact.

Signed, sealed, and delivered in presence of—
Witness: WARD McALLISTER.

STATE OF CALIFORNIA,
County of San Francisco.

The undersigned signify their approval to the within transfer by affixing hereto their seals and signatures, this fifteenth (15th) day of September, A. D. one thousand eight hundred and fifty-one.

ROB'T H. CRITTENDEN, [SEAL.]
By his attorney, G. W. GUTHRIE.
ISAAC SAFFARANS, B. [SEAL.]

Sealed and delivered in presence of—
WARD McALLISTER.

Recorded in Liber 1 of Leases, pages 476 to 480 inclusive.

H.

I, as collector of the port of San Francisco, do hereby accept the iron warehouse erected by Alexander Cross upon a part of the water lot No. 49, on Battery street, now in the occupation of the United States government as a bonded warehouse, as the warehouse contracted to be built by Daniel Saffarans, as provided in a contract of which the within is a copy. And I do hereby officially recognize said Cross as landlord, it being understood that I am to incur no individual responsibility in the premises. This acceptance to date as if done January 14, 1851.

T. BUTLER KING,
As Collector of the Port of San Francisco.

Recorded in county recorder's office of San Francisco, September 20, 1851, in Liber No. 1 of Leases, pages 478, &c., at 1 o'clock p. m.

JOHN A. McGLYNN,
County Recorder,
By JAMES C. GRADY.

STATE OF CALIFORNIA, }
County of San Francisco. }

On this twenty-sixth day of January, A. D. 1852, personally appeared before me, a notary public in and for the said county, Isaac Saffarans, B., known to me to be attorney in fact of A. P. Sheldon, the individual described in and who executed foregoing approval of transfer by his said attorney, and the said Isaac Saffarans, B., acknowledged to

me that he executed the same as the act and deed of the said A. P. Sheldon.

In faith and testimony whereof, I have hereunto set my hand and
[L. s.] affixed my seal of office, this 26th day of January, A. D.
1852.

WARD McALLISTER,
Notary Public.

Recorded in the office of the county recorder in Liber No. 2 of
Leases, p. 79, January 29, 1852, D, 12 o'clock and 15 minutes p. m.

J. A. McGLYNN,
County Recorder,
Per M. E. T.

Recorded in county recorder's office of San Francisco, September
20, 1851, in Liber No. 1 of Leases, pages 476, &c., at 1 o'clock p. m.

CUSTOM-HOUSE, SAN FRANCISCO,
Collector's Office, August 14, 1853.

SIR: I have the honor to inform you, that in obedience to instructions which I have received from the Secretary of the Treasury under date of April 12, 1853, that the "pretended lease" under which the warehouse belonging to you on Battery street has been occupied for the storage of goods by the United States, "is not binding on the United States," and that I am to abandon that building. I shall on the 13th instant give up the possession of the said store, and not pay any rent for it after that date.

Respectfully your obedient servant,

RICHARD P. HAMMOND,
Collector.

ALEXANDER CROSS, Esq.

Know all men by these presents that I, A. P. Sheldon, of Sumner county, in the State of Tennessee, recently of San Francisco, in the State of California, have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint Isaac Saffarans, B., of San Francisco aforesaid, my true and lawful attorney in fact, for me and in my name and stead to endorse my name and approval upon a certain deed of conveyance, executed by Daniel Saffarans of Shelby county, Tennessee, to Alexander Cross, of England, now in San Francisco, about the month of June, 1851, whereby the said Daniel Saffarans conveyed to the said Cross an iron fire-proof warehouse of four stories, erected by said Cross in the city of San Francisco aforesaid, which said warehouse is now occupied by the government of the United States, under a lease from the said Daniel Saffarans, for custom-house purposes; it being now impracticable for me, in the absence of papers relating to the same, to describe the property conveyed by said deed with more minuteness and precision; which

said deed was sent to California by the said Daniel Saffarans as an *escrow*, to take effect as a deed, upon condition that the same should be approved and endorsed by Robert Crittenden, the said Isaac Saffarans, B., and myself; and the same has been approved and endorsed by the said Robert Crittenden, by George W. Guthrie, his attorney in fact, and by the said Isaac Saffarans, B., and would have been approved and endorsed by myself in person, had I not left California before the said deed arrived there.

And I hereby engage to ratify and confirm the approval and endorsement of the said deed by my said attorney in fact, as fully and amply as though the same were done by myself in proper person.

In testimony whereof, I have hereunto set my hand and affixed my seal this 19th day of November, in the year of our Lord one thousand eight hundred and fifty one.

A. P. SHELDON. [L. s.]

STATE OF TENNESSEE, }
Sumner County. }

Personally appeared before me, John L. Bugg, clerk of the county court of said Sumner county, A. P. Sheldon, the bargainor, with whom I am personally acquainted, and who acknowledged that he executed the foregoing power of attorney, for the purposes therein specified.

Witness my hand and seal of office, at office in the town of Gallatin, [L. s.] this, the 19th day of November, A. D. 1851.

JOHN L. BUGG.

Clerk of Sumner County Court.

Know all men by these presents, that I, Daniel Saffarans, of the town of Memphis, in the State of Tennessee, do hereby nominate, constitute, and appoint Robert H. Crittenden, Isaac Saffarans, and A. P. Sheldon, my true and lawful attorneys in fact, for me and in my name to deliver to Alexander Cross, of San Francisco, in California, my assignment to said Cross of all my right, title, and interest in and to an iron warehouse in San Francisco, together with all rents accrued, or to accrue on the same, as are more particularly set forth in my said assignment bearing date of the 10th day of July, 1851, and attached to a certified copy of my contract of 11th November, 1850, with T. Butler King, collector of San Francisco, for the rent of said house, &c.

And my said attorneys are also hereby fully authorized and empowered to receipt for and receive from said Cross all money, bonds, or notes stipulated to be received by me as the consideration for said assignment, and to take from said Cross a release of all responsibility on my part, arising out of any and all contracts heretofore made between us in relation to the building or renting of said house.

And my said attorneys are also hereby fully authorized and empowered, if any objection is made to the form of my said assignment or its mode of authentication, to alter or amend the same at their discretion or, in fact, to make any new or other assignment for me.

And my said attorneys are also hereby fully empowered and author-

ized to substitute another attorney in their places, with the same full powers in the premises as are hereby conferred on them; hereby binding and obliging myself to ratify and confirm whatever my said attorneys, or their substitute, may do in the premises, and making their acts as binding on me as if done by myself.

In testimony whereof I have hereunto set my hand seal this 10th day of July, 1851.

DANL. SAFFARANS. [L. s.]

Signed, sealed, and acknowledged in presence of the undersigned witnesses

H. M. LUSHER,
C. G. LEONARD,
JAMES ROSE, JR.

STATE OF TENNESSEE, } ss.
Shelby county, }

Personally appeared before me, James Rose, a duly commissioned and sworn notary public, in and for said county, Daniel Saffarans, the constituent above named, with whom I am personally acquainted, who acknowledged the execution of the within power of attorney for the purposes therein contained.

Witness my hand and the impress of my seal of office at Memphis, [L. s.] in said county, July 10, 1851.

JAS. ROSE,
Notary Public.

Recorded at the office of the county recorder, in Liber 1, of Powers of Attorney, page 501, September 18, 1851, at 1 o'clock and 25 minutes p. m.

JOHN. A. McGLYNN,
County Recorder.

NEW YORK, July 25, 1851.

Know all men by these presents, that I, R. H. Crittenden, of Frankfort, Kentucky, do hereby nominate, constitute, and appoint George W. Guthrie, of the city of San Francisco, California, my true and lawful attorney in fact, to act for me under the foregoing joint power of attorney from Daniel Saffarans to Isaac Saffarans, A. P. Sheldon, and myself, with power of substitution, hereby authorizing the said Guthrie to exercise all the rights and powers which I myself could do under the said power of attorney from Daniel Saffarans, binding myself to approve whatever the said Guthrie may do in the premises, making his acts as binding as if done by me.

Witness my hand and seal.

R. H. CRITTENDEN. [L. s.]

Signed and sealed in presence of—

JAMES ELDREDGE,
GEO. N. SANDERS.

STATE OF CALIFORNIA, }
 County of San Francisco, } ss.

On this 18th of September, A. D. 1851, before me, the undersigned deputy county recorder in and for said county, personally appeared James Eldredge, known to me to be a subscribing witness to the execution of the foregoing instrument by R. H. Crittenden, who, on being by me duly sworn, did depose and say: That he was present when the said Crittenden executed the said instrument, and that the said Crittenden acknowledged in his presence that he executed the same freely and voluntarily, and for the use and purposes therein expressed, and that he, the said Eldredge, thereupon became a subscribing witness. Witness my hand and seal of office.

[L. s.]

JAS. O'GRADY,
Deputy County Recorder.

Recorded in the office of the County Recorder of San Francisco, Lib. 1, Powers of Attorney, p. 501, September 28, 1851, at 1 o'clock and 25 minutes p. m.

JOHN A. McGLYNN, *County Recorder.*
 By JAS. O'GRADY, *Deputy.*

WASHINGTON, June 4, 1857.

I waive all objection to the admissibility of this paper as evidence.
 M. BLAIR, *Solicitor.*

Know all men by these presents, that I, Daniel Saffarans, of the county of Shelby, and State of Tennessee, have nominated, constituted and appointed, and by these presents do nominate, constitute, and appoint my son, Isaac Saffarans, B., now of San Francisco, in the State of California, my true and lawful attorney in fact, for me and in my name to demand, collect, and receive all moneys due to me, or hereafter to become due to me, in the State of California; and particularly to demand and receive from the collector of the customs at the port of San Francisco, or any other proper officer whose duty it may be to pay the same, all moneys now due or hereafter to become due to me from the government of the United States of America, for the rent of an iron warehouse in San Francisco, under a contract made by me with the said government, and full receipts and acquittances for all such moneys to execute in my name.

And I do also hereby further authorize and empower my said attorney in fact, for me and in my name, to purchase from Alexander Cross, all his interest in an iron warehouse in San Francisco, erected by said Cross under a contract with me; the extent of said interest being twenty-seven and two-thirds one hundredths ($27\frac{2}{3}-100$) of the whole, and to pay to said Cross whatever may be due to him from me on account of advances made by him for me towards the purchase of the lot on which the said warehouse is erected, and the erection of said

warehouse ; and if it shall be necessary to raise money for the purpose of making the said purchase and payment, I hereby authorize my said attorney in fact to raise the same by a loan, to any amount not exceeding ninety thousand dollars, (\$90,000,) and to secure the repayment thereof by an assignment of the rents of the said warehouse, hereafter to become due from the government of the United States, in such manner as may be agreed on by the party or parties loaning the money ; and my said attorney in fact, to whose discretion I confide all the details of the necessary arrangements respecting the security to be given for said loan ; and I hereby engage to ratify and confirm all the acts and things that may be done by my said attorney in fact in the premises, pursuant to this power of attorney, in as full and ample a manner as though the same were done by myself in proper person.

Given under my hand and seal this twelfth day of April, in the year of our Lord one thousand eight hundred and fifty-one.

DAN'L SAFFARANS. [SEAL.]

STATE OF TENNESSEE, }
Shelby county, } ss.

Personally appeared before me, Jas. Rose, a duly commissioned and qualified notary public, in and for said county, Daniel Saffarans, the within named constituent with whom I am personally acquainted, who acknowledged the execution of the within power of attorney for the purposes therein contained.

Witness my hand and the impress of my seal of office, at Memphis, [SEAL.] in said county, this 12th day of April, 1851.

JAS. ROSE,
Notary Public.

Recorded in the office of the county recorder of San Francisco, in Liber 1 of Powers of Attorney, page 500, September 18, 1851, at 11 o'clock, a. m.

JOHN A. McGLYNN,
County Recorder.

By JAS. O'GRADY,
Deputy.

JUNE 4, 1857.

I waive objection to the admissibility of this paper in evidence.

M. BLAIR, Solicitor.

IN THE COURT OF CLAIMS.—No. 771.

ALEXANDER CROSS vs. THE UNITED STATES.

I consent that testimony may be taken in the above entitled cause without notice to me, reserving the right to cross-examine the witnesses if I shall deem it proper to do so after the return of the examination in chief.

M. BLAIR, Solicitor.

STATE OF CALIFORNIA,
City and county of San Francisco, } ss.

On this 16th day of July, A. D. 1857, personally came Henry Lund, who was sworn to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States; and he does, upon oath, testify that his name is Henry Lund; that he is a storekeeper for Cross & Co.; that he is between twenty-four and twenty-five years of age; that he has resided in this city the past year; that he has no interest, either direct or indirect, in the claim in question; that he is not related to the claimant in any degree whatever.

Question. How long have you been storekeeper for Cross & Co.?

Answer. Since February, A. D. 1854, up to this time.

Question. Do you know the building in question in this claim?

Answer. Yes, sir.

Question. Have you kept an account of all the storage received in that building since you have been storekeeper for Cross & Co.?

Answer. Yes, sir.

Question. Will you produce that account?

Answer. Here it is sir.

NOTE.—The account is here produced and annexed to this deposition, marked A.

Question. Does this account show Mr. Lund the time when the storage was received, the time when it was delivered, and the rate of storage?

The question was objected to by counsel for the United States, and withdrawn by counsel for claimant.

Question. By whom was that account marked A made up; when was it made up; and from what was it taken?

Answer. It was made up by myself; it was made up within the last two weeks; it was extracted from Cross & Co.'s storage books and from copies of storage bills rendered, with the exception of bills made out against Cross & Co. themselves, commencing at number twenty-two and ending at twenty-eight, inclusive.

Question. Who kept the storage books from which that account was made?

Answer. I did, sir.

Question. The storage bills rendered, of which you have spoken, what were they taken from?

Answer. From the storage books.

Question. From your own knowledge, as storekeeper of Cross & Co., can you state that the account marked A is a full and correct account of all the storage received in that building from the time you commenced with them up to the 14th of November, 1856?

Answer. I commenced in February, and no storage was received until September the 1st, 1854; from that time until the 14th of November, 1856, I think the account marked A shows a fair statement; I think it is correct, according to my best knowledge.

Question. Have you any doubt about its correctness?

The counsel for the United States objects, and the counsel for claimant withdraws the question.

The counsel for claimant having closed, the counsel for the United States here took the witness.

Question. Have Cross & Co. had any other person besides yourself who has acted at any time as storekeeper since February, 1854?

Answer. No, sir.

Question. Have they had other warehouses in San Francisco in which they have stored goods for hire?

Answer. Yes, sir.

Question. During the whole of the period since you have been storekeeper for them?

Answer. Yes, sir.

Question. How many other warehouses, besides the one in question, have they had during that time?

Answer. Two others.

Question. Have goods been stored in the two other warehouses during said time in preference to the one in question?

Answer. There was no preference given to any warehouse, I had myself the control of putting or storing the goods where I pleased in three warehouses, and being disinterested I put them in all alike.

Question. Was not your interest the same as that of your employers?

Answer. My only interest was a monthly salary.

Question. Were there any goods stored in the other two warehouses of Cross & Co. between February and the first of September, 1854?

Answer. Yes, sir.

Question. Were they full or nearly so during that period?

Answer. Sometimes nearly full, at other times not half full.

Question. How did it happen that no goods at all, as you have above stated, were stored in the warehouse in question during that period, from February, 1854, to September 1, 1854, if no preference was given to the other two warehouses as you have stated, in storing goods?

Answer. What I have above stated about goods stored in the said warehouses during that period, I meant goods stored by Cross & Co., or received on storage by Cross & Co. The reason there were no goods stored during that period by Cross & Co., or received on storage during that period, was because the building was rented to another party, and that party had the full control of it. I mean that I could not put any goods in there.

Question. Who was that party?

Answer. F. S. Alvarez

Question. What rent did he pay for said warehouse during that period to Cross & Co.?

Answer. I do not know, sir.

Question. Who kept the books of Cross & Co.?

Answer. Joseph Clark.

Question. Did he keep all the books of the firm?

Answer. I think he did, except the storage-books.

Question. Was not the principal business of Cross & Co. storing goods in San Francisco?

Answer. No, sir.

Question. How did it happen that Clark did not keep the books containing their storage accounts?

Answer. Because the storekeeper who was before me kept the storage-books, and I think the general rule in the city is that storekeepers keep these accounts.

Question. Was the warehouse in question full of goods at any time from the 1st of September, 1854, to the 14th of November, 1856?

Answer. No, sir.

Question. Was it most of the time during that period empty or nearly so?

Answer. It was never entirely empty, and there were times that there were very few goods in it, and at other times nearly full, according to how goods came in and went out.

Question. Were all the goods received and stored in said warehouse that were offered or that could have been obtained on storage by Cross & Co., during said period?

Answer. All the goods that were offered, or that could have been obtained, were stored in the three warehouses, and there was no preference given to either, as I have above stated.

Question. Was the warehouse in question used by Cross & Co., or by any other person or persons with their permission, for any other purpose than the storing of the goods which you have mentioned, during the period from 1st of September, 1854, to 14th of November, 1856?

Answer. The lower floor was occupied from the latter part of 1855 to the 14th of November, 1856, and is so now. The other three floors of the store were occupied by storage, as I have mentioned; they were not occupied for any other purpose.

Question. For what purpose and by whom was the lower or ground floor occupied, and at what rent, from the latter part of 1855, as you have mentioned?

Answer. It was occupied by Southgate & Co. for the ship chandlery business. The rent I do not know.

Question. Is the ground floor the most valuable for business purposes?

Answer. It is generally considered the most valuable.

Question. Where are the storage books of Cross & Co?

Answer. They were in the storage office of Cross & Co. when I left to come here.

Question. Are all the entries in said books in your handwriting, and were they all made by you?

Answer. All the entries since I became storekeeper are in my handwriting.

Question. Is exhibit A all in your handwriting?

Answer. All of said exhibit is in my handwriting, except the date and signature of Cross & Co. at the foot of extract from storage books, and also at the end of exhibit A.

Question. Can you swear positively that exhibit A contains a true account of all the goods that were stored in the warehouse in question from the 1st September, 1854, till 14th November, 1856, except the goods had in the lower floor of said warehouse, as you have mentioned, by Southgate & Co. during the time that they occupied said lower floor?

Answer, Yes, sir.

Question. How does it happen that Cross & Co.'s storage books do not exhibit a full account of the storage taken into said warehouse, but that you are obliged to resort to copies of bills for storage rendered?

Answer. The storage books contain the number of packages taken in, the date of receipt and the date of the delivery, and by that I can see how many tons there are stored every month, and I make out my storage bills from that.

Question. Did you not say on your direct examination that exhibit A was extracted from Cross & Co.'s storage books and from copies of bills for storage rendered, with the exception of the bills made out against Cross & Co?

Answer. Yes, sir, I said so and say so still.

Question. What part of said exhibit was extracted or made out from copies of bills for storage rendered?

Answer. From page No. 1, to No. 21, inclusive; I mean those marked.

Question. Did you yourself make out the original bills against Cross & Co?

Answer. There were no original bills against Cross & Co.

Question. Were the goods stored by Cross & Co. charged the same rates as goods stored by other people during the same period?

Answer. Yes, sir.

The counsel for the United States here closed, and the counsel for claimant again took the witness.

Question. Mr. Lund, you stated that Mr. Clark was the bookkeeper of Cross & Co., and kept all the books, except the storekeeper's books; did not the subject-matter of the storekeeper's books go ultimately into Mr. Clark's books?

Answer. Yes; after the bills were made out and collected the cash went into his books.

Question. You have said also that the account A is made up from the storage books and copies of bills rendered; where are the bills that were actually rendered?

Answer. The original bills were delivered to the parties against whom they were made out; as soon as they were receipted, as a matter of course they kept them.

Question. What kind of copies were those; how were they taken?

Answer. They were press copies; taken by what is known as letter-press.

Question. Does what was taken from these original bills tally with the storage books?

Answer. Yes, sir; so far as the amount of storage shown by bills and the amount of storage on each lot, as per storage books.

Question. Do they differ in any respect from the storage books?

Answer. No, sir.

Question. Does everything that appears in the copies of the bills, from which a portion of A was taken, tally with the storage books?

Answer. Yes, sir.

The counsel for the United States here again took witness.

Question. Who made the letter press copies of the bills from which exhibit A, was in part made up as you have stated?

Answer. The machine made them, and I worked the machine. I made the original bills.

Question. Do you know personally anything in regard to the expenses of receiving and delivering the goods as charged in exhibit A?

Answer. I know that I myself wrote the sixty-two and a half cents in the bill, in the office, and I know from my personal experience that that is a low charge for receiving and delivering goods.

The counsel for claimant again took the witness.

Question. Did Cross & Co., have to pay for the receipt and delivery of goods mentioned in that account?

Answer They did.

Question. Do you know anything else relative to the claim in question?

Answer. No, sir.

HENRY LUND.

STATE OF CALIFORNIA, }
City and County of San Francisco. }

On this 16th day of July, A. D., 1857, personally came Henry Lund, the witness within named, and after having been first sworn to tell the truth, the whole truth and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Henry Lund, taken at the request of the counsel for claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Alexander Cross. The adverse party attended by consent and did not object.

TULLY R. WISE, *Commissioner*.

Fees of witness.....	\$1 50
Commissioner's fees.....	15 00
	16 50

A.—Extract from Cross & Co.'s storage books of goods stored in A. Cross' iron warehouse No. 1, from September 1, 1854, to November 14, 1856.

ALEXANDER CROSS.

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On account of whom.	Description of goods.	Tons.	Amount of storage rec'd.
F. S. Alvarez	9,281 bags barley	495 $\frac{5}{16}$	\$3,458 12
	743 mats rice	54 $\frac{3}{16}$	142 35
	47 mats rice	1 $\frac{3}{16}$	5 00
	562 bags walnuts	26 $\frac{6}{16}$	198 05
	320 bags paddy	23 $\frac{3}{16}$	152 25
	475 packages shot	15	11 25
	112 kegs paints	3	15 75
	3 casks ink	1 $\frac{5}{16}$	6 72
	16 lamps	1	4 50
	3 cases lampwicks	1	4 50
	81 bales cordage	20 $\frac{2}{16}$	106 33
	39 cases China trunks	7	43 10
	15 cases cigars	5 $\frac{1}{16}$	21 43
	18 cases matches	9	52 72
	7 boxes tobacco	0 $\frac{5}{16}$	74
	16 cases cigaritos	0 $\frac{4}{16}$	60
	5 packages chairs	2 $\frac{2}{16}$	22 44
	1 case blankets	0 $\frac{2}{16}$	57
	94 cases lard	8	36 00
	9 cases sausages	1	2 25
	2 cases sarsaparilla	0 $\frac{5}{16}$	74
	35 ceroons peaches	4	9 00
	3 cases sweetmeats	0 $\frac{6}{16}$	2 00
	6 cases hats	1 $\frac{6}{16}$	7 25
	30 cases wine	1	9 00
	97 cases cordials	3	9 00
	29 cases vermouth	1 $\frac{3}{16}$	3 00
	17 packages Chili peppers	2 $\frac{5}{16}$	5 04
	50 firkins butter	5 $\frac{1}{16}$	5 07
	50 firkins butter	5 $\frac{5}{16}$	4 37

Jonathan Peel.....	70 cases lard	7	13 30
	50 casks hams	16 ⁶ / ₁₀	19 16
J. T. Raymond.....	700 bags barley	36	39 00
Samuel Price & Co.....	600 bags barley	27 ⁷ / ₁₀	41 00
Grisar, Byrne & Co.....	700 bags barley	32 ⁷ / ₁₀	24 50
	368 half bags flour	18 ⁴ / ₁₀	30 19
	121 packages salt	10	10 00
	4,506 small bags salt	22	97 00
	63 cases salt	18	59 19
	3,202 small bags salt	17 ⁶ / ₁₀	49 47
H. M. Schwabe & Co.....	44 tierces hams	14 ⁸ / ₁₀	44 00
E. Herrick.....	156 bags wheat	7 ⁵ / ₁₀	20 62
Charles Vinzent.....	1,180 bags wheat	59 ⁷ / ₁₀	179 25
	631 quarter bags flour	15 ⁸ / ₁₀	47 13
	598 quarter bags flour	15	37 37
	1,200 quarter bags flour	30	75 00
	748 bags wheat	36 ⁵ / ₁₀	91 25
	1,241 bags wheat	63 ⁵ / ₁₀	158 75
	599 quarter bags flour	15	29 94
	1,257 bags wheat	64 ⁴ / ₁₀	161 00
	156 quarter bags flour	3 ⁹ / ₁₀	9 75
	801 quarter bags flour	20	29 98
	50 hogsheads ale	16 ⁷ / ₁₀	65 75
	70 casks ale, quarts	17 ⁵ / ₁₀	25 36
	300 casks porter, pints	50	92 34
	50 casks ale, pints	8 ³ / ₁₀	9 69
	34 casks porter, quarts	8 ⁵ / ₁₀	18 62
	121 casks of porter, quarts	30 ³ / ₁₀	39 31
	40 cases ale, quarts	10	14 12
	10 cases ale, quarts	2 ⁵ / ₁₀	3 24
	30 hogsheads porter	10	75 00
	98 crates crockery	98	153 00
	10 bales carpeting	5	15 00
	2 bales carpeting	1	3 75
		1,512	6,121 17
Cross & Co.....			

Amount of gross storage received, (as per accounts attached)	\$6,121 17
Less, expenses receiving and delivering 1,512 tons, at \$62 50 per ton.....	945 00
Amount of net storage	<u>5,176 00</u>

CROSS & CO.

SAN FRANCISCO, *July 14, 1857.*

No. 1.

SAN FRANCISCO, *October 2, 1854.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage from September 1 to October 1, on 654 tons goods in one month, at 75 cents.....	<u>\$490 50</u>
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No. 2.

SAN FRANCISCO, *November 1, 1854.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage on following goods from October 1 to date, at 75 cents per ton :	
Since October 1, delivered $3\frac{4}{5}$ tons.....	\$2 85
This date remaining in store, $635\frac{1}{5}$ tons.....	476 40
	<u>479 25</u>

No. 3.

SAN FRANCISCO, *December 1, 1854.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage to date on following goods, at 75 cents per ton :	
Since November 1, delivered $39\frac{1}{5}$ tons.....	\$29 40
This date in store, 596 tons.....	447 00
November 3, received $2\frac{1}{2}$ tons.....	1 68
November 24, received $5\frac{5}{8}$ tons }	
November 29, received $5\frac{5}{8}$ tons }	1 00
	<u>479 08</u>

No. 4.

SAN FRANCISCO, *January 1, 1855.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage to date on following goods, at 75 cents per ton:

Since December 1, 1854, delivered $14\frac{1}{2}$ tons.....	\$11 19
This date in store, 574 tons.....	430 50
December 14, 1854, received 7 tons.....	2 80
December 14, 1854, received $16\frac{3}{4}$ tons.....	6 66

451 15For 3 months' storage on $3\frac{1}{8}$ tons rice, (overweight and not charged in former account).....

9 60

460 75

No. 5.

SAN FRANCISCO, *February 1, 1855.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage to date on following goods, at 75 cents per ton:

Since January 1, delivered 22 tons.....	\$16 50
This date in store, $575\frac{1}{4}$ tons	431 81

448 31

No. 6.

SAN FRANCISCO, *March 1, 1855.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage to date on following goods, at 75 cents per ton:

Since February 1, delivered 15 tons	\$11 25
This date in store, $560\frac{3}{4}$ tons	420 56

431 81

No. 7.

SAN FRANCISCO, *April 1, 1855.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage to date on following goods, at 75 cents per ton:

Since March 1, delivered $33\frac{5}{8}$ tons	\$25 37
This date in store $63\frac{3}{4}$ tons	47 81

73 18

No. 8.

SAN FRANCISCO, April 1, 1855.

F. S. Alvarez, Esq., to Cross & Co., Dr.

For storage on barley from March 1 to date:

Say 464 tons, one month, at 75 cents..... \$348 00

No. 9.

SAN FRANCISCO, May 1, 1855.

F. S. Alvarez, Esq., to Cross & Co., Dr.

For storage on following goods, from April 1 to date, at 75 cents per ton:

Last month delivered one ton..... \$0 75

This date in store 529 tons..... 396 75

397 50

No. 10.

SAN FRANCISCO, May 12, 1855.

F. S. Alvarez, Esq., to Cross & Co., Dr.

For one month's storage on following goods, from May 1, at 75 cents per ton:

529 tons..... \$396 75

No. 11.

SAN FRANCISCO, July 26, 1855.

F. S. Alvarez, Esq., to Cross & Co., Dr.

For storage on goods from June 1 to August 1, at 75 cents per ton per month:

1,281 bags barley, 41½ tons, two months..... \$66 25

261 bags walnuts, 16 tons, one month..... 12 00

174 bags walnuts, 11½ tons, one month..... 8 55

3 casks ink, 1½ tons, two months..... 2 25

5 packages chairs, 2½ tons, two months..... 3 75

30 cases wine, 1 ton, two months..... 1 50

94 30

No. 12.

SAN FRANCISCO, *August 7, 1855.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage on $31\frac{1}{2}$ tons barley (overweight, and not charged
in former account) from September 1, 1854, to August 1,
1855 :

$31\frac{1}{2}$ tons, eleven months, at 75 cents..... \$259 87

No. 13.

SAN FRANCISCO, *September 17, 1855.**F. S. Alvarez, Esq., to Cross & Co., Dr.*

For storage on following goods, from August 1, at 75 cents per ton
per month :

183 bags of walnuts, (delivered August 24,) $11\frac{2}{3}$ tons, 1 month.	\$8 55
3 casks of ink, (delivered August 23,) $1\frac{1}{2}$ tons, 1 month.....	1 12 $\frac{1}{2}$
5 packages of chairs, (delivered August 23,) $2\frac{1}{2}$ tons, 1 month	1 87 $\frac{1}{2}$
30 cases of wine, (delivered August 22,) 1 ton, 1 month.....	75
	<u>12 30</u>

No. 14.

SAN FRANCISCO, *September 17, 1855.**Jonathan Peel, Esq., to Cross & Co., Dr.*

For storage on 700 bags of barley, from July 1 :

400 bags, delivered up to August 1, 20 tons in 1 month, at 75 cents.....	\$15 00
300 bags, delivered up to September 1, 16 tons in 2 months, at 75 cents.....	24 00
	<u>39 00</u>
For ditto on 600 bags of barley, from August 1, equal to $27\frac{3}{4}$ tons, 2 months, at 75 cents.....	41 00
	<u>80 00</u>

No. 15.

SAN FRANCISCO, *July 25, 1855.**Messrs. J. P. Raymond & Co., to Cross & Co., Dr.*

For one month storage on 600 bags of barley, $32\frac{3}{4}$ tons, at
75 cents..... \$24 50

No. 16.

SAN FRANCISCO, April 24, 1856.

Messrs. Samuel Price & Co., to Cross & Co., Dr.

For storage on 368 half bags of flour, from January 6, 1856:

18 $\frac{8}{20}$ tons, 1 month, at 75 cents.....	\$13 80
16 $\frac{17}{20}$ tons, 1 month, at 50 cents.....	8 42
15 $\frac{19}{20}$ tons, 1 month, at 50 cents.....	7 92
	30 19

No. 17.

SAN FRANCISCO, July 26, 1855.

Messrs. Grisar, Byrne & Co., to Cross & Co., Dr.

For storage on salt, as follows:

121 packages, received February 20, 10 tons, 1 month, at \$1		\$10 00
4,506 10 pound bags, received February 20, 22 tons, 1 month at \$1.....	\$22 00	
3,978 10 pound bags, from March 20, 20 tons, 5 months, at 75 cents.....	75 00	
		97 00
63 cases, received March 9, 18 tons, 1 month, at \$1	18 00	
58 cases, from April 9, 16 $\frac{2}{3}$ tons, 1 month, at 75 cents	12 50	
50 cases, from May 9, 14 $\frac{1}{4}$ tons, 1 month, at 75 cents.....	10 69	
44 cases from June 9, 12 $\frac{1}{2}$ tons, 1 month, at 75 cents.....	9 37 $\frac{1}{2}$	
40 cases, from July 9, 11 $\frac{1}{2}$ tons, 1 month, at 75 cents	8 62 $\frac{1}{2}$	
		59 19
3,202 bags, received March 4, 17 $\frac{3}{5}$ tons, 1 month, at \$1.....	17 60	
3,157 bags, from April 4, 16 $\frac{1}{2}$ tons, 2 months, at 75 cents.....	24 75	
1,108 bags, from June 4, 5 $\frac{1}{2}$ tons, 1 month, at 75 cents.....	4 12	
790 bags, from July 4, 4 tons, 1 month, at 75 cents.....	3 00	
		49 47
		215 66

No. 18.

SAN FRANCISCO, *April 3, 1855.**Messrs. H. M. Schwabe & Co. to Cross & Co., Dr.*

For storage on 44 tierces hams, from date of receipt, January 26, equal to $14\frac{2}{3}$ tons, 3 months, at \$1.....	\$44 00
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No. 19.

SAN FRANCISCO, *June 18, 1856.**E. Herrick, Esq., to Cross & Co., Dr.*

For storage on 156 bags wheat, from March 10 to April 10, 1 month, on $7\frac{1}{2}$ tons, at 75 cents.....	\$5 62
For storage on 156 bags wheat, from March 10 to July 10, 3 months, on $7\frac{1}{2}$ tons, at 50 cents.....	11 25
	<u>16 87</u>

No. 20.

SAN FRANCISCO, *August 2, 1856.**Edwin Herrick, Esq., to Cross & Co., Dr.*

For storage on 156 bags wheat, from July 10 to August 1, (delivered,) $7\frac{1}{2}$ tons in 1 month, at 50 cents	\$3 75
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No. 21.

SAN FRANCISCO, *July 9, 1856.**Charles Vinzent, Esq., to Cross & Co., Dr.*

For storage as follows:

Susan Abigale, 1,180 bags wheat, from February 8 to March 8, $59\frac{3}{4}$ tons, 1 month, at \$1	\$59 75	
To June 19, $59\frac{3}{4}$ tons, 4 months, at 50 cents.....	119 50	
	<u>179 00</u>	
631 quarter bags of flour, from February 8 to March 8, $15\frac{3}{4}$ tons, 1 month at \$1.....	15 77	
To June 20, $15\frac{3}{4}$ tons, 4 months, at 50 cents.....	31 36	
	<u>47 13</u>	
Mathew Wassar, 598 quarter bags of flour, from February 18 to March 18, $14\frac{3}{4}$ tons, 1 month, at \$1	14 95	
To June 16, $14\frac{3}{4}$ tons, 3 months, at 50 cents.....	22 42	
	<u>37 37</u>	

Ocean Bird, 1,200 quarter bags of flour, from February 25 to March 25, 30 tons, 1 month, at \$1..	\$30 00	
To June 20, 30 tons, 3 months, at 50 cents.....	45 00	
		\$75 00
748 bags of wheat, from February 25 to March 25, 36 $\frac{1}{2}$ tons, 1 month, at \$1.....	36 50	
To June 19, 36 $\frac{1}{2}$ tons, 3 months, at 50 cents.....	54 75	
		91 25
Nahumkeag, 1,241 bags of wheat, from March 10 to April 10, 63 $\frac{1}{2}$ tons, 1 month, at \$1.....	63 50	
To June 24, 63 $\frac{1}{2}$ tons, 3 months, at 50 cents.....	95 25	
		158 75
Francisco, 599 quarter bags of flour, from March 15 to April 15, 14 $\frac{3}{4}$ tons, 1 month, at \$1.....	14 97	
To June 16, 14 $\frac{3}{4}$ tons, 2 months, at 50 cents.....	14 97	
		29 94
Desdemona, 1,257 bags of wheat, from March 12 to April 12, 64 $\frac{4}{10}$ tons, 1 month, at \$1	64 40	
To July 7, 64 $\frac{4}{10}$ tons, 3 months, at 50 cents.....	96 60	
		161 00
156 quarter bags of flour, from March 12 to April 12, 3 $\frac{9}{10}$ tons, 1 month at \$1.....	3 90	
To June 26, 3 $\frac{9}{10}$ tons, 3 months, at 50 cents.....	5 85	
		9 75
Whiting, 801 quarter bags of flour, from May 5 to June 5, 20 $\frac{1}{4}$ tons, 1 month, at \$1.....	20 02	
To July 7, 19 $\frac{3}{4}$ tons, 1 month at 50 cents.	9 96	
		29 98
		819 42

No. 22.

SAN FRANCISCO, April 26, 1855.

Messrs. Cross & Co. to Cross & Co., Dr.

For storage on fifty hogsheads ale, from October 13, 1854 :	
To December 13, 1854, 50 hogsheads, 16 $\frac{2}{3}$ tons, 2 months, at 75 cents	\$25 00
To January 13, 1855, 49 hogsheads, 16 $\frac{1}{3}$ tons, 1 month, at 75 cents	12 25
To February 13, 1855, 48 hogsheads, 16 tons, 1 month, at 75 cents.....	12 00
To April 13, 1855, 29 hogsheads, 9 $\frac{2}{3}$ tons, 2 months, at 75 cents.....	14 50
To date, 8 hogsheads, 2 $\frac{2}{3}$ tons, 1 month, at 75 cents.	2 00
	65 75

No. 23.

SAN FRANCISCO, *May* 22, 1855.*Messrs. Cross & Co. to Cross & Co., Dr.*

For storage on 70 casks ale, each 6 dozen quarts:	
From February 14 to March 14, 70 casks, $17\frac{1}{2}$ tons, 1 month, at 75 cents	\$13 12
To April 14, 60 casks, 15 tons, 1 month, at 50 cents.....	7 50
To May 14, 37 casks, $9\frac{1}{4}$ tons, 1 month, at 50 cents	4 62
To date, 1 cask, $\frac{1}{4}$ ton, 1 month, at 50 cents.....	12
	25 36

No 24.

SAN FRANCISCO, *June* 19, 1855.*Messrs. Cross & Co. to Cross & Co., Dr.*

For storage on beer, as follows:

Three Hundred Casks of Porter—Pints.

From February 3, to March 3, 300 casks, 50 tons, one month, at 75 cents.....	\$37 50	
To April 3, 237 casks, $39\frac{1}{2}$ tons, one month, at 50 cents.....	19 75	
To May 3, 215 casks, $35\frac{5}{8}$ tons, one month, at 50 cents.....	17 92	
To June 3, 143 casks, $25\frac{5}{8}$ tons, one month at 50 cents.....	11 92	
To date, 63 casks, $10\frac{1}{2}$ tons, one month, at 50 cents	25	
		\$92 34

Fifty Casks of Ale—Pints.

To March 3, 50 casks, $8\frac{1}{3}$ tons, one month, at 75 cents.....	\$6 28	
To May 3, 17 casks, $2\frac{5}{8}$ tons, two months, at 50 cents.....	2 83	
To June 3, 7 casks, $1\frac{1}{8}$ tons, one month, at 50 cents	58	
		9 69

Thirty-four Casks of Porter—Quarts.

To March 3, 34 casks, $8\frac{1}{2}$ tons, one month, at 75 cents.....	\$6 37	
To May 3, 34 casks, $8\frac{1}{2}$ tons, two months at 50 cents.....	8 50	
To June 3, 18 casks, $4\frac{1}{2}$ tons, one month, at 50 cents.....	2 25	
To date, 12 casks, 3 tons, one month, at 50 cents..	1 50	
		18 62

One Hundred and Twenty-one Casks of Porter—Quarts.

To March 3, 121 casks, $30\frac{1}{4}$ tons, one month, at 75 cents.....	\$22 69	
To April 3, 107 casks, $26\frac{3}{4}$ tons, one month, at 50 cents.....	13 37	
To May 3, 26 casks, $6\frac{1}{2}$ tons, one month, at 50 cents.....	3 25	
		\$39 31

Forty Cases of Ale—Quarts.

To March 3, 40 cases, 10 tons, one month, at 75 cents.....	7 50	
To April 3, 40 cases, 10 tons, one month, at 50 cents.....	5 00	
To May 3, 13 cases, $3\frac{1}{4}$ tons, one month, at 50 cents	1 62	
		14 12

Ten Cases of Ale—Quarts.

To March 3, 10 cases, $2\frac{1}{2}$ tons, one month, at 75 cents.....	1 87	
To April 3, 7 cases, $1\frac{3}{4}$ tons, one month, at 50 cents	87	
To May 3, 4 cases, 1 ton, one month, at 50 cents...	50	
		3 24
		177 32

No. 25.

SAN FRANCISCO, *August 10, 1855.**Messrs. Cross & Co. to Cross & Co., Dr.*

For storage on 30 hogsheads porter, from October 13, 1854, to date; equal to 10 tons, 10 months, at 75 cents per ton.....	\$75 00

No. 26.

SAN FRANCISCO, *August 10, 1855.**Messrs. Cross & Co. to Cross & Co., Dr.*

For storage on 98 crates crockery, from May 5, 1855, to June 5, 98 tons, 1 month, at 75 cents per ton.....	\$73 50
To July 5, 88 tons, 1 month, at 50 cents per ton.....	44 00
To August 5, 71 tons, 1 month, at 50 cents per ton.....	35 50
	153 00

No. 27.

SAN FRANCISCO, November 14, 1856.

Messrs. Cross & Co. to Cross & Co., Dr.

For storage on 10 bales carpeting, from January 17, to February 17, 10 bales, 5 tons, 1 month, at 75 cents per ton.	\$3 75
To May 17, 7 bales, 3½ tons, 3 months, at 50 cents per ton.	5 25
To date, 4 bales, 2 tons, 6 months, at 50 cents per ton.	6 00
	15 00

No. 28.

SAN FRANCISCO, November 14, 1856.

Messrs. Cross & Co. to Cross & Co., Dr.

For storage on 2 bales carpeting from April 15 to date:	
To May 15, 2 bales, 1 ton, 1 month, at 75 cents per ton.	\$0 75
To date, 2 bales, 1 ton, 6 months, at 50 cents per ton.....	3 00
	3 75

Amount of storage received by Cross & Co. on goods stored in A. Cross' iron warehouse No. 1, from 1st September, 1854, to 14th November, 1856, as per accounts attached.

Account No. 1.....	\$490 50	Brought up.....	\$4,451 60
No. 2.....	479 25	Account No. 15.....	24 50
No. 3.....	479 08	No. 16.....	30 19
No. 4.....	460 79	No. 17.....	215 66
No. 5.....	448 31	No. 18.....	44 00
No. 6.....	431 81	No. 19.....	16 87
No. 7.....	73 18	No. 20.....	3 75
No. 8.....	348 00	No. 21.....	819 42
No. 9.....	397 50	No. 22.....	65 75
No. 10.....	396 75	No. 23.....	25 36
No. 11.....	94 30	No. 24.....	177 32
No. 12.....	259 87	No. 25.....	75 00
No. 13.....	12 30	No. 26.....	153 00
No. 14.....	80 00	No. 27.....	15 00
		No. 28.....	3 75
Carried up.....	4,451 60		
Amount of gross storage received (as per extract from storage books attached)...			6,121 17
Less: Expenses receiving and delivering 1,512 tons, (do.,) at 62½ cents.....			945 00
Amount of net storage			5,176 00

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this 29th day of December, A. D. 1857, personally came before me Richard P. Hammond, who, having been first sworn according to law to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States, does, upon his oath, depose and say, that his name is Richard P. Hammond; that he is a surveyor; that he is thirty-seven years of age; that he has resided in San Francisco during the past year; that he has no interest, either direct or indirect, in the claim in question; that he is not related to the claimant in any degree whatever.

Question. What was your occupation in August, 1853?

Answer. I was collector of the customs in the district of San Francisco, California.

Question. Do you recollect a warehouse of Mr. Alexander Cross, leased to the government as a bonded warehouse?

Answer. Yes, sir. The warehouse had been leased to the government by Danial Saffarans, and Mr. Cross was assignee of Mr. Saffarans.

Question. Did you, as collector of the port, give notice to Mr. Cross that the government intended to abandon the lease of that warehouse?

Answer. I did, in my official capacity as collector of the customs of San Francisco, notify Mr. Cross in writing that the government intended to abandon that warehouse on a certain date, and would cease to pay rent for the house after that time; this written notice was served on Mr. Cross on the 13th of August, 1853.

Question. Did you receive from Mr. Cross any reply to that notice, and if so state whether it was in writing or verbal?

Answer. I did receive from Mr. Cross a written reply to my written notification upon the same date on which that notification was served upon him.

Question. Have you that written reply in your possession?

Answer. I have not. It was a public paper, and was either sent to the Secretary of the Treasury or filed with other public papers in the appropriate archives of the custom-house.

Question. Can you state the tenor of that reply; and if so please state it?

NOTE.—The counsel for the United States objects to the question on the ground that the original reply has not been shown to be lost or out of the power of the claimant to produce.

Answer. The purport of Mr. Cross' reply was to the effect that he did not think the government had any right to abandon his warehouse, and that he should still continue to expect rent for it, and to regard it as rented to the government.

Question. Will you look at the paper now shown you, and marked Exhibit A, and state whether that is the written reply sent to you by Mr. Cross, or a copy of it?

NOTE.—The counsel for the United States objects to the question as leading.

Answer. I have no means of swearing positively that this is a copy of the letter to which I refer. In substance it is the same as the reply

of Mr. Cross, alluded to above, and I have no reason to believe it is not an exact copy of that original. I have been shown Exhibit A for the first time, purporting to be a press copy of that letter; in reading it over I find the letter to which it purports to be a reply was dated August 4; my impression is that that letter could not have been delivered to Mr. Cross before the 13th of August, for the reason that the warehouse to which the goods from Cross' warehouse were removed was being built, and it was uncertain when it could be occupied. I only gave the notice when I was ready to remove the goods.

Question Did you receive more than one letter from Mr. Cross in reply to the notice you gave him of the intention of the government to abandon his warehouse?

Answer. But one.

The counsel for the claimant here closed, and counsel for the United States took the witness.

Question. Have you any recollection of having seen said reply of Cross since the time you say it was delivered to you?

Answer. None at all. I have no recollection of having seen it since. I have no knowledge of where it is. In the month of April or May, 1855, I received from the Secretary of the Treasury a communication inquiring what had been done in respect to the warehouse in question, under his instructions to me of April, 1853; this letter caused me then to review the whole matter in my reply, and I remember to have stated to the Secretary, in that answer, that the warehouse in question had been abandoned, in pursuance of his instructions, on the 13th of August, 1853, and against the protest of Mr. Cross to such abandonment. I also looked over the papers that were in my office to search for the protest, and examined my letter book of correspondence with the department to ascertain if it had been sent there. I could not find the protest at all after making a diligent search for it, nor could I find any record of its having been forwarded to the department at Washington. I could only account, however, for its absence from my files upon the supposition that it had been forwarded to the department with a previous letter upon the subject of this warehouse, dated August 15, 1853. This last named letter and the letter above referred to from myself to the Secretary, in reply to his in the spring of 1855, comprised the whole correspondence between the department and myself upon this subject.

Question. When original letters were forwarded from the custom-house, at San Francisco, to the Department of the Treasury, at Washington, were not copies of them preserved in the custom-house at San Francisco?

Answer. That depended upon the subject matter of the letter; if they were about matters of which the Secretary had exclusive control, and about which I expected to have nothing to do again, I kept no copies, otherwise generally sent copies and not originals.

Question. Whilst you were collector did you allow letters and other documents relating to the business of the collector's office to be taken from that office?

Answer. By no one save myself. I frequently took letters from the Secretary of the Treasury to my house to reply to them there. The

custom-house has been twice moved since that letter was written, and both times in a hurry. One removal was made whilst I was in office, and I, subsequent to that removal, missed letters from my file of the Secretary's correspondence, and had to write to Washington for other copies.

Question. Did you ever examine your private papers to see whether this reply had got amongst them?

Answer. I did, several months since, at the request of Mr. Clark. I could find nothing of it.

Question. Do you know anything else relative to the claim in question; if you do, please state it?

Answer. I do not know anything else.

RICHARD P. HAMMOND.

STATE OF CALIFORNIA, }
City and county of San Francisco, } ss.

On this 29th day of December, A. D. 1857, personally came Richard P. Hammond, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Richard P. Hammond, taken at the request of Mr. Emmet, counsel for claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Alexander Cross.

J. B. Townsend attended on behalf of the United States, as counsel, and did not object.

TULLY R. WISE,
Commissioner.

Commissioner's fees, \$8.

STATE OF NEW YORK, }
City and County of New York, } ss.

On this sixteenth day of July, eighteen hundred and fifty-seven, personally came Thomas Butler King, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Thomas Butler King, taken at the request of Samuel F. Vinton, esq., to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Alexander Cross. The adverse party was not notified, did not attend, and did not object.

G. R. J. BOWDOIN,
Commissioner of Court of Claims.

IN THE COURT OF CLAIMS.

ALEXANDER CROSS *vs.* THE UNITED STATES.

Deposition of Thomas Butler King, a witness examined in this cause on the part of the claimant, at the city of New York, the sixteenth day of July, eighteen hundred and fifty-seven.

Question. What is your name, occupation, age, and place of residence, and what has been your place of residence for the past year? Have you any interest, direct or indirect, in the claim which is the subject of inquiry in this action? Are you related to the claimant; and if yea, in what degree?

Answer. Thomas Butler King; am a cotton planter; fifty-three years of age. My residence is in Glynn county, Georgia. I have been travelling for most of the past year. I have no interest whatever in the claim which is the subject of inquiry in this action. Am not, in any degree whatever, related to the claimant.

Question. Please state whether you lately held the office of collector of the port of San Francisco, and when did you arrive at the port of San Francisco and take charge of the collector's office?

Answer. I was appointed collector of the port of San Francisco in October, 1850. I arrived at the port of San Francisco early in January, 1851, and took charge of the custom-house and entered upon my duties, as nearly as my recollection serves me, about the fourteenth or fifteenth of January, 1851.

Question. Did you, after your arrival at San Francisco, examine the warehouse which was the subject of the contract of the eleventh of November, 1850, between you, as collector of the port of San Francisco, on the part of the United States, of the one part, and Daniel Saffarans of the other part; and if so, did you, as such collector, accept said warehouse as being substantially of the character, description, and dimensions required by the stipulations of an article of agreement for the erection of said warehouse entered into between the said Saffarans, of the one part, and James Collier, as collector of said port of San Francisco, of the other part?

Answer. Yes, I did examine the warehouse which was the subject of that contract of the eleventh of November, 1850. I did, as such collector, accept the warehouse referred to in this interrogatory as being substantially in compliance with said contract, and continued to occupy it as a government warehouse.

Question. Did you endorse your acceptance on a copy of the contract above referred to; and if so, please state at what time, according to the best of your recollection, the endorsement was made?

Answer. Some seven or eight months after I entered upon the performance of my duties as collector, and on Mr. Cross becoming the assignee of the lease above referred to, I endorsed my acceptance of the building on the contract of lease, to take effect from the fourteenth of January, 1851, and I believe that copy exhibit No. 7, on the six-

teenth page of the printed petition in this case, is a true copy of said endorsement.

Question. Do you know of any other matter relative to the claim in question in this action? If yea, state it.

Answer. Nothing occurs to me.

T. BUTLER KING.

Subscribed in my presence, and sworn to before me, this 16th day of July, 1857.

G. R. J. BOWDOIN,
Commissioner of Court of Claims.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this 29th day of December, A. D. 1857, personally came before me Joseph Clark, who, having been first sworn according to law to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States, does upon his oath depose and say: That his name is Joseph Clark; that he is a commission merchant; that he is thirty years of age; that he has resided at San Francisco during the past year; that he has no interest, either direct or indirect, in the claim in question; that he is not related to the claimant in any degree whatever.

Question. What was your occupation in August, 1853?

Answer. Book-keeper and cashier for Cross & Co.

Question. Do you recollect that Mr. Cross was notified that the government intended to abandon the lease of his warehouse; and if so, how was that notice communicated to him, and by whom, and when?

Answer. I do remember; he was notified in writing, by Richard P. Hammond, who was then collector of the customs at the port of San Francisco. The notification was received in August, 1853, on or before the 13th.

Question. Did Mr. Cross reply to that notice?

Answer. He did, in writing, to the said collector, Richard P. Hammond.

Question. Look at the paper now shown you, and marked exhibit A, and state whether you have ever seen it before, and what it is?

Answer. I have seen it before; it is a press copy of the letter written by me and signed by Mr. Cross, which was sent to Collector Hammond. I am not positive, but my impression is that I delivered the letter myself to the collector or his private secretary.

Question. Was that the letter that was sent in reply to the notification of which you have previously spoken?

NOTE.—Counsel for the United States objects to the question as leading.

Answer. Yes; it was.

The counsel for claimant here closed, and the counsel for the United States took the witness.

Question. Why do you think that you yourself delivered the letter which you have mentioned to the collector or his private secretary?

Answer. Because I, in general, attended to all of Cross & Co.'s custom-house business.

Question. Is that the only reason that you think so?

Answer. I have a slight recollection at the time of having taken this letter to the collector's office and of having had some conversation with him on the subject.

Question. Who was the collector's private secretary at that time?

Answer. Cyril A. Grey.

Question. Do you know what has become of the original of exhibit A, other than what you have stated?

Answer. No, sir.

The counsel for the United States here closed, and the counsel for the claimant took the witness.

Question. Do you know who made that press copy marked exhibit A, and if so state it?

Answer. I do; I did it.

Question. Do you know anything else relative to the claim in question, if you do please state it?

Answer. I know nothing more about it.

JOS. CLARK.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this 29th day of December, A. D. 1857, personally came Joseph Clark, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Joseph Clark, taken at the request of Mr. Emmet, counsel for claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Alexander Cross. J. B. Townsend, esq., attended as counsel for the United States and did not object.

TULLY R. WISE,
Commissioner.

Commissioner's fees, \$7.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this third day of August, 1857, personally came before me Ira P. Rankin, who, having been first duly sworn according to law to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States, does, upon his oath, depose and say: That his name is Ira P. Rankin; that he is a merchant; that he is forty years of age; that he has resided in the

city of San Francisco during the past year; that he has no interest, either direct or indirect, in the claim in question; that he is not related to the claimant in any degree whatever.

Question. How long have you resided and done business in the city of San Francisco as a merchant?

Answer. Five years last past in June last.

Question. Have you, during that time, owned or occupied a warehouse in the city of San Francisco? And if so, have you received goods on storage therein, or stored goods in other warehouses in said city?—I mean within the period from September 1, 1854, to November 14, 1856?

Answer. During all the period from September 1, 1854, to November 14, 1856, I have both owned and occupied a warehouse; I held many consigned goods on storage—goods consigned to me; I did not make a business of receiving goods on storage; such as I had were received incidentally, rather than as a matter of regular business. I bought my warehouse in April, 1854, and there were then some six hundred tons of goods in it on storage, and they remained until they were drawn out, some of them after a lapse of a year or more; and, during the same time, I was having many goods stored in other warehouses.

Question. Do you know the prices of storage of goods in the city of San Francisco, in free warehouses, on the 1st of September, 1854, to the 14th of November, 1856? If so, please state what were the average prices in such warehouses, during said period, in said city.

Answer. I should say that it would be impossible to fix any regular price, the rates varying with the position and security of the warehouse, the responsibility of its managers, and their anxiety to get business. I should think, however, that for a year succeeding the 1st of September, 1854, there was not a great deal of storage taken in first class warehouses below one dollar a ton. Some, undoubtedly, was taken lower than that. In the fall of 1854 I remember to have procured storage for one parcel of goods for seventy-five (75) cents a ton a month. I also had one small parcel in my own warehouse received at seventy-five (75) cents a ton a month. With these exceptions I neither received or paid, according to my recollection, less than one dollar a ton per month, until after the middle of the year 1855.

NOTE.—The counsel for claimant objects to testimony of rates of storage in individual and particular cases, in response to the foregoing question.

Answer continued. I should say I had a good deal of merchandise, from September 1, 1854, to middle of 1855, in my warehouse—consigned goods—consigned to me as storage, for which I was charging one dollar and a quarter a ton per month; but I would not consider that as fixing the current rate of storage in the market, for the reason that commission merchants owning warehouses are accustomed to consider storage in part one of the perquisites of business. I should think, from my knowledge of storage business in San Francisco, from the middle of 1855 to November 14, 1856, that a fair average rate in first class warehouses was about seventy-five cents a ton per month; though I think it is true that, during the whole of the year 1856,

some of the large warehouses were receiving storage at as low a rate as fifty cents a ton per month.

Question. At what price were the goods stored in your warehouse when you purchased it in April, 1854?

NOTE.—The counsel for claimant objects to the question, because it is not comprehended within the period embraced in this case; and next because it is testimony as to a particular case or instance of storage.

The counsel for the United States withdraws the question.

Question. Were you or your firm, during the period from September 1, 1854, to November 14, 1856, extensively engaged in mercantile business in San Francisco, and familiar with the rates and prices of storage in said city?

Answer. I was engaged to a considerable extent in mercantile business here, and supposed to be reasonably well informed in regard to the general rates of storage, though I do not pretend to be an expert.

Question. What was the average expense of receiving and delivering goods taken on storage in said city, during the same period above mentioned, to wit: From September 1, 1854, to November 14, 1856; I mean such a warehouse as the one in question, if you know?

Answer. I know the warehouse in question; I never have taken any precise account of receiving or delivering merchandise in my own warehouse, but have made rough estimates of these expenses; the expense in any warehouse would depend a good deal upon the extent to which the storage business was carried on; whether largely enough to employ a number of experienced laborers constantly at low wages, or in so moderate a way as to require the employment of transient labor at much higher rates; I am inclined to think that fifty cents a ton would not be far from the expense of receiving and delivering merchandise, in and from such a storehouse as that of Cross & Co.; in this estimate, including only the labor, and making no allowance for the warehouse clerk, I mean this for the whole period; it would not vary much; I had in my mind an average business, where the warehouse was kept tolerably well filled, neither a very small or a very large one, when I named fifty cents a ton as a fair price.

Question. Would it or not make the average expense less if the person who occupied the warehouse in question at the same time occupied two or three other warehouses for storage, adjoining it?

NOTE.—The counsel for claimant objected to the question, because the hypothesis is not correct in point of fact, and the question is irrelevant.

Answer. Probably it would make the expense less, because they would be enabled to distribute their labor to better advantage.

The counsel for the United States here closes his direct examination, and the counsel for claimant does not desire to cross-examine the witness.

Question. Do you know any other matter relative to the claim in question; if you do, state it?

Answer. Nothing at all, sir.

IRA P. RANKIN.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On the first day of August, A. D. 1857, the commissioner was requested to take the deposition of the above witness, but he did not make his appearance, and we adjourned till the third, and on the third personally came Ira P. Rankin, the witness within named, who, having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Ira P. Rankin, taken at the request of Mr. Townsend, counsel for the United States, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Alexander Cross.. The adverse party attended by consent, by his attorney, Mr. Emmett, and he did not object.

TULLY R. WISE,
Commissioner.

Commissioner's fees \$9 10

No. 6.

STATE OF CALIFORNIA, }
City and county of San Francisco, } ss.

On this 5th day of August, A. D. 1857, personally came before me F. MacCrellish, who, having been first duly sworn, according to law, to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States, does, upon his oath, depose and say: That his name is Frederick MacCrellish; that he is a newspaper publisher; that he is between twenty-seven and twenty-eight years of age; that he has resided in San Francisco during the past year; that he has no interest, either direct or indirect, in the claim in question; that he is not related to the claimant in any degree whatever.

Question. How long have you resided in San Francisco?

Answer. Five years last past, with an exception of an absence of three months in the east.

Question. Have you been engaged in the commercial or storage business in San Francisco since your residence here?

Answer. I have.

Question. Do you know the warehouse built by Alexander Cross, under contract with the United States, for a bonded warehouse, on Battery street, in San Francisco?

Answer. I know the building in question. I know it was used for a bonded warehouse by the government of the United States. I do not know anything of his building it by contract.

Question. Can you state the average prices of storage in such warehouse in the city of San Francisco on the 1st of September, 1854, to the 14th of November, 1856? If so, please state them.

Answer. I can only answer for one year to my own knowledge, from my experience in that business. I know from the 1st of September, 1854, to about October, 1855, the average prices, for I was in the business during that period. From the first part of that period it was about one dollar a ton a month; and the last part of the period the price had declined to about seventy-five cents or eighty-seven cents. During that period there were others getting more than I was. Then, again, there was other class of storage that we got three dollars and a quarter a ton a month for, including drayage.

Question. Was the building you occupied a large or small one?

Answer. Its capacity was about seven thousand tons, which was the largest warehouse then in San Francisco; and I had more storage, I think, than any other building in San Francisco.

Question. Do you know the average price of storage during the latter part of the period above mentioned, to wit: from September, 1855, to November 14, 1856, in such warehouses as the one in question, in San Francisco?

Answer. I was commercial editor and reporter of the Alta California newspaper during that time, and as such I had a very good idea, I think, of the price of storage; I reported the prices of articles but not of storage. I went to these places every day of my life, except Sundays. Some persons get as high as a dollar a ton a month, and it ranged from that down to fifty (50) cents a ton a month.

Question. What was the expense, if you know, of receiving and delivering goods as storage in such warehouses as the one in question during the above period; that is, from the 1st of September, 1854, to November 14, 1856?

Answer. I cannot answer definitely, because I do not know the price in that building. The first part, I should say it would not be less than eighty-seven and a half cents, and the latter part of the period it ought to have been a little less; I cannot say that it was; the wages of people were pretty much the same thing. I had rather not answer that question, because I may be entirely wrong as to a building like that. I never had anything to do with a building like that.

Question. What rent would the building in question have brought, or, in other words, at what sum could it have been rented from the 1st of September, 1854, to the 1st of September, 1855?

NOTE.—The counsel for claimant objects to the question, until it is first shown that the witness is an expert upon that subject.

The counsel for United States waives the question for the present.

Question. Do you know the current rate of rents of such buildings as the one in question, in the city of San Francisco, from the 1st of September, 1854, to the 1st of September, 1855?

Answer. No; but I do know the current rates of rent of such buildings in that locality, I mean of fire-proof buildings. I was doing

business within a block of there and passed by every day except Sunday, and knew the prices that were paid in that vicinity.

Question. Please state what were the current rates of rents of such warehouses in that vicinity during the period just mentioned?

NOTE.—The counsel for claimant objects, first, because the question is irrelevant, the building not being let at all during that period; and in the next place because the rent should not be estimated upon it as if it were a warehouse.

Answer. There were buildings about that size, during the first part of that period, about the first of September, 1854, that rented for about five hundred dollars a month; you may say for the first twelve months I paid for my building four thousand dollars a month. I paid after that, that is from the 1st September, 1855, to October, 1856, two hundred and fifty dollars per month for a smaller building. I would freely have given three hundred and fifty dollars per month for that building, the one in question, and probably more. I have made a mistake in time. I mean from 1st September, 1855, to October, of the same year, and not of 1856.

Question. Was there, in your opinion, any difficulty in letting the building in question at the prices you have mentioned during those periods?

Answer. From July, 1854, to October, 1855, I should think it could have been let at these prices, that is, during the period at 1st September, 1854, it would have commanded five hundred dollars a month easily, but I can't say how long it would have commanded these prices. On the first of September, 1855, I would have given three hundred and fifty dollars a month for it myself.

Question. Did you make application to rent the building in question at that time?

Answer. I don't recollect positively whether I did or not.

The counsel for the United States here closed, and counsel for claimant takes the witness.

Question. Will you explain the reason why some goods commanded three dollars and a quarter a ton, whilst the average price of storage at that time was a dollar?

Answer. All goods coming from ships on which the freight was not paid were charged three dollars and twenty-five cents.

Question. Will you state whether that price of three dollars and twenty-five cents a ton had anything to do with the average price of storage at that time?

Answer. That only applies to the kind of goods I have mentioned and did not apply to the ordinary rates of storage.

Question. When you say that such a store as Mr. Cross' could have commanded five hundred dollars rent, do you mean to say that you know of any persons that were ready to take the building at that rent?

Answer. I don't know of any persons that applied or wanted the building or store, except myself, for the period I have mentioned. In the latter part of 1854 I don't think there could have been any difficulty at all in letting it for five hundred dollars a month.

Question. Do you mean to say that in the latter part of 1854 you knew of any person who was willing to take it for that price?

Answer. No.

Question. During any period between September, 1854, and 14th November, 1856, were you engaged in the real estate business?

Answer. No, sir.

Question. You stated in your direct examination that you do not particularly recollect whether you applied to Mr. Cross to rent that building; have you any idea that you ever did apply?

Answer. I was looking for a building about that time, and the probabilities are I made application for it; but I cannot say I did; I found a building across the street from where I was, which I took.

Question. Do you recollect of ever having spoken to Mr. Cross about it?

Answer. My impression is that I did; but I can't speak positively.

Question. Have you any impression that you spoke to Mr. Cross, Mr. Clark, or any one else in Cross & Co's establishment?

Answer. It was one of the firm, or some one in their employ; it may have been Mr. Clark.

Question. Do you now say that you ever did speak to any one of them?

Answer. At that particular period of time my impression is I spoke as I said before, but previous to September, 1855, I had frequently spoken with Mr. Cross about the building. I want a distinction drawn between my impression and positive knowledge. I had often told Mr. Cross if I left the building I was in I should probably want a building from him; that was previous to September, 1855.

The counsel for claimant here closed.

Question. Do you know anything else relative to the claim in question; if you do, state?

Answer. I do not.

FREDERICK MACCRELISH.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On the 5th day of August, A. D. 1857, personally came Frederick MacCrelish, the within named witness, and, after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers which were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Frederick MacCrelish, taken at the request of J. B. Townsend, counsel for the United States, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Alexander Cross. The following and accompanying notification was handed to the commissioner, and Mr. Emmet appeared for the claimant, and did not object.

TULLY R. WISE, *Commissioner*.

Commissioner's fees, \$7 50.

Rep. C. C. 198—5

IN THE UNITED STATES COURT OF CLAIMS.

ALEXANDER CROSS *vs.* UNITED STATES.

The above named Alexander Cross will please take notice that on Saturday the 1st day of August, A. D. 1857, at 11 o'clock a. m. of said day, the depositions of Ira P. Rankin, L. P. Sage, Frederick Griffin, Daniel Flint, and Frederick MacCrelish will be taken in said cause on behalf of said United States before Tully R. Wise, United States Commissioner of said Court, at his office in the "Merchant's Exchange," corner Washington and Battery streets in the city of San Francisco, and that the taking of said depositions if not completed on that day, will be continued by adjournment from day to day thereafter until completed.

JAMES B. TOWNSEND,
Solicitor on behalf of the United States.

SAN FRANCISCO, *July 30, 1857.*

I acknowledge receipt of a copy of the foregoing notice and do not object to the time.

C. TEMPLE EMMET,
Attorney for Alexander Cross.

JULY 30, 1857.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss.*

On this 17th day of July, A. D. 1857, personally came before me Joseph Clark, who, having been first duly sworn according to law to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States, does upon his oath say, that his name is Joseph Clark; that he is a commission merchant; that he is thirty years of age; that he has resided in San Francisco during the past year; that he has no interest, either direct or indirect, in the claim in question; that he is not related to the claimant in any degree whatever.

Question. What was your occupation August 13, 1853?

Answer. I was bookkeeper for Cross & Co.

Question. State when you first went into the employment of Cross & Co., and how long you continued so?

Answer. I first went into their employment on the 22d June, 1852, and was in their employment until the 30th of June, 1856, as bookkeeper and cashier.

Question. Since June 30, 1856, what has been your occupation to the present time?

Answer. I have been a partner in the house of Cross & Co.

Question. During the time you have been connected with the house of Cross & Co., either as bookkeeper or partner, what has been the principal business of that house?

Answer. Commission business.

NOTE.—The counsel for the United States objects to the competency of this witness to give testimony by reason of interest, which he claims is apparent upon the foregoing examination.

Question. Has the house or firm of Cross & Co., of which you are a member, any interest in this claim, or in the property in question in this suit?

Answer. None whatever.

Question. Are you a partner of Mr. Alexander Cross in his general transactions?

Answer. I am a partner of Mr. Alexander Cross, so far as his commission business is concerned, in San Francisco?

Question. Do you know the property in question?

Answer. I do.

Question. Will you state what use that property has been put to from August 13, 1853, to November 14, 1856?

Answer. From August 13, 1853, to the 1st of September, 1853, it was empty; and from the 1st of September, 1853, to 1st of September, 1854, the entire building was rented to Francisco Salvador Alvarez; from 1st of September, 1854, to 10th of August, 1855, the building was used for storage by Cross & Co.; from the 10th of August, 1855, up to the beginning of this year, March, I think it was, 1857, J. J. Southgate & Co. had about three-fourths of the first floor, the ground floor; the balance of the building was used for storage by Cross & Co.

Question. When you say, used for storage by Cross & Co., do you mean that the building was used for storage of the goods of Cross & Co. exclusively?

Answer. No, sir; we would receive goods on storage from any third party, and we did receive goods from any party.

Question. State, if you please, Mr. Clark, what rent Mr. Alvarez paid for that building during the time he occupied it, as you have testified?

Answer. Nine thousand dollars, or seven hundred and fifty dollars a month.

Question. Was that the rate of rent at which it was leased to Mr. Alvarez?

Answer. Yes, sir.

Question. Was that a fair rate of rent at the time it was leased to Mr. Alvarez?

Answer. I consider it a very fair rent.

Question. Has Mr. Cross any other buildings like the one in question, and had he at that time?

Answer. He had two others at that time, exactly the same, adjoining; whether he has them now or not I do not know; he may have sold them since I have heard from him.

Question. Will you state now whether at the time the building in question was rented to Mr. Alvarez, as you have testified, either of the others was rented to any tenant; and if so, at what rate?

Answer. One of the other buildings, the entire building, was rented to Samuel Price & Co., from the 14th day of August, 1854, to the 14th day of May, 1855, at a monthly rent of five hundred dollars.

Question. State what rent Mr. Southgate & Co. paid at the time they occupied a portion of the ground floor, as you have testified?

Answer. One hundred dollars a month.

Question. Was that a fair rent during that time?

Answer. I think so.

Question. During the time you have testified that storage was received in this building, who was the storekeeper who superintended the storage?

Answer. Henry Lund.

Question. State, sir, what were his general duties as storekeeper?

Answer. Receiving and delivering goods; that is, giving receipts and taking receipts for goods, keeping the storage-books, and making out storage accounts, delivering the accounts, and receiving the money.

Question. During that period of which you have spoken, did any one else perform that duty besides Mr. Lund?

Answer. Not in a general way; Mr. Lund might be out delivering accounts and perhaps I might deliver a few packages and take receipts for them during his absence.

Question. Was the use which you have spoken of to which the building in question was devoted during that period, the only use to which it was devoted during that period; or in other words, was that building devoted to any other purpose than what you have testified, from August 13, 1853, to November 14, 1856?

Answer. No, sir; it was devoted to no other purpose.

Question. Can you state what were the rates of storage during the time you have testified that storage was received in that building?

Answer. It varies now, and it varied then, according to the number of tons put in at once by one man, from fifty cents to a dollar per ton per month.

The counsel for claimant here closed his examination, and the counsel for the United States commenced his cross-examination.

Question. Where does Alexander Cross, the claimant, now live?

Answer. On the 13th day of June last he was living at Valparaiso, Chile; no the 30th of May was the last date from there.

Question. Has he ever resided in San Francisco, California?

Answer. Yes, sir.

Question. During what time?

Answer. I knew him to reside here in 1851, and he left in July, 1856, and resided here all of that time.

Question. What was the style of the firm with which he was connected at San Francisco from 13th of August, 1853, to 14th of November, 1856?

Answer. Cross & Co.

Question. Had you no interest, contingent or other, in said house from the 13th of August, 1853, to 30th of June, 1856, when you say you became a partner?

Answer. The only interest I had was a monthly salary, which did not depend upon the business.

Question. From the 30th of June, 1856, to 14th November, 1856,

have you been interested in the business of Cross & Co., their losses and gains, as well from storage as from other sources?

Answer. No, sir.

Question. In what manner, then, have you been interested in their business, and in losses and gains of said firm, during said last mentioned period?

Answer. When Mr. Cross left he made me a partner, with a monthly salary, until he consulted with his partner in Valparaiso about the division of the per centage of the business, and although I remained a partner I was on a salary till 31st of December, 1856?

Question. Please state, then, in what manner you were a partner from June 30, 1856, to November 14 in the same year.

Answer. I was a nominal partner with power to sign "Cross & Co."

Question. Did your compensation depend upon their business during that period?

Answer. No, sir.

Question. Who composed the firm of Cross & Co., of San Francisco, on the 13th of August, 1853, to the 14th of November, 1856?

Answer. Alexander Cross, of San Francisco, and David Thomas, of Valparaiso, from that date to June 30, 1856. After that it was the same, (Alexander Cross and David Thompson,) together with John Wedderspoon and Joseph Clark, both of San Francisco. Mr. Wedderspoon and myself were on a monthly salary from July 1, 1856, to December 31, 1856.

Question. Did Cross & Co. occupy the warehouse in question from the 1st of September, 1854, to the 14th of November, 1856, except the portion which they rented to Southgate & Co.?

Answer. They occupied it for taking in storage.

Question. Did they collect the rents from Alvarez and Southgate & Co.?

Answer. They did, sir.

Question. Did they rent the whole warehouse, as you have mentioned, from the 1st of September, 1853, to 1st of September, 1854, to Alvarez, and the ground floor to Southgate & Co., from the 10th of August, 1855, to the 14th of November, 1856.

Answer. Mr. Cross rented it. Whether he was acting for himself or for Cross & Co. I don't know.

Question. Was the rent obtained from Alvarez the highest rent that could have been obtained for said warehouse during the year that he occupied it?

Answer. Yes, sir.

Question. Could it have been rented to him the year following?

Answer. It was offered to him for five hundred dollars a month the next year, and he refused.

Question. Did he make an offer for it?

Answer. Not to my knowledge.

Question. Did any one else, to your knowledge, offer to rent it during said second or any subsequent year, down to November 14, 1856?

Answer. No, sir.

Question. Were there not more goods stored in either of the other

warehouses owned by Cross from September 1, 1854, to August 14, 1856, than in the warehouse in question?

Answer. There might have been more in the warehouse rented by Samuel Price & Co., but in the other there was no more, to my knowledge.

Question. Could no goods be obtained on storage from August 13, 1853, to the 1st of September of the same year?

Answer. We had it advertised for rent. We took no storage during that time until we saw whether we could rent it for a reasonable time.

Question. Was there any relationship, personal or in business, between Francisco Salvador Alvarez and Alexander Cross or his Valparaiso partner, during the time he rented said warehouse, except said renting?

Answer. Not to my knowledge.

Question. Was there not, from the 1st of September, 1854, to the 10th of August, 1855, and even to the 14th of November, 1856, large quantities of goods arriving in San Francisco which were stored, and could not said warehouse have been kept filled, or nearly so, by the use of reasonable exertions for that purpose?

Answer. Goods were arriving here, but the store could not have been kept filled.

Question. Has the warehouse in question been kept in good order for the storage of goods during the whole of said period, that is, from the 13th of August, 1853, to the 14th of November, 1856?

Answer. Yes, sir.

Question. Has not the roof been leaky?

Answer. No, sir.

Question. Was it not in other respects out of repair and not in a condition to preserve goods stored without damage?

Answer. No, sir.

Question. Were either of the other buildings owned by Cross rented to any one prior to the 14th of November, 1856, except the renting which you have mentioned to Price & Co.?

Answer. The only renting of these buildings was to Price & Co., as I have before stated.

Question. Was there any business or other connexion between Price & Co. and Cross or Cross & Co. except said renting?

Answer. We have bought goods from him and he bought goods of us, but there was no connexion other than might have been between two other commission merchants.

Question. You say Southgate & Co. occupied a portion of the ground floor at one hundred dollars a month; who occupied the balance of said floor, for what purpose, and at what rent?

Answer. Cross & Co., for storage.

Question. Did you often, during the absence of Lund, deliver goods and take receipts for them?

Answer. I could not answer how many times.

Question. When you did so, did you make the proper entries of such delivery in the storage book kept by him?

Answer. I made the proper entries in the delivery book, got the

drayman to sign it. I never wrote in the storage books except this one delivery book.

Question. Did the price of storing goods in San Francisco during the period from August 13, 1853, to November 14, 1856, generally among storekeepers, vary in the manner you have stated, that is, from fifty cents to one dollar per month, according to the quantity stored?

Answer. I did not state that.

Question. Well, then, state what you did state?

Answer. I stated, from the 1st of September, 1854, to the 14th of November, 1856, it varied in that way.

Question. Was that variation customary in San Francisco?

Answer. Yes, sir; in free stores, not in bonded stores.

The counsel for the United States having closed, the counsel for claimant again took the witness.

Question. In one of your answers to the cross-examination you state that Cross & Co. occupied the building in question for taking in storage; do you mean by the word "occupy" the same as the word "use?"

The counsel for the United States objects to the question as leading.

Answer. I answered that they occupied or used the building only for storage. They never had their offices in it, nor slept in it, or used it for any other purpose.

Question. In one of your answers to the cross-examination you state that there might have been more goods in the warehouse leased to Samuel Price & Co. than there was in this one; do you mean goods on storage with Cross & Co., or goods on storage with Samuel Price & Co.?

Answer. The goods were on storage with Samuel Price & Co., and Cross & Co. had no interest in the goods or storage.

NOTE.—The counsel for claimant here shows the witness the advertisement marked A, annexed to the deposition of R. Cutler Moore, and asks:

Question. What building that advertisement refers to?

Answer. It refers to the building that I have been testifying about, and known as the first United States bonded warehouse. It refers to the building in question and nothing else.

Question. Were either of the other buildings of which you have spoken ever occupied as the United States bonded store?

Answer. Yes, sir; but not during that period; that is, not anterior to that advertisement.

Question. Do you know anything else relative to the claim in question?

Answer. No, sir.

JOS. CLARK.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this 17th day of July, A. D., 1857, personally came Joseph Clark, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the

questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Joseph Clark, taken at the request of counsel for claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Alexander Cross. The parties appeared by consent of counsel and did not object.

TULLY R. WISE,
Commissioner

Fees of witness	\$1 50
Commissioner's fees	15 00
	16 50

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this 16th day of July, A. D. 1857, personally came before me R Cutler Moore, the witness within named, who, having been first sworn according to law to tell the truth, the whole truth, and nothing but the truth relative to the claim of Alexander Cross against the United States, does upon his oath testify that his name is R. Cutler Moore; that he is a printer; that he is thirty-nine years of age; that he has resided in this city for the past year; that he has no interest, either direct or indirect, in the claim in question, and that he is not related to the claimant in any degree whatever.

Question. What has been your occupation since August 18, 1853?

Answer. I have been engaged in the office of the Alta California newspaper as printer and a portion of the time as publisher.

Question. Look at that advertisement, Mr. Moore, and state when it first appeared in the Alta California newspaper, and how many times it was published in said paper.

Answer. It first appeared on August 18, 1853, and was published for fifteen days consecutively, Sundays as well as other days.

(The said advertisement is hereto annexed, marked A.)

Question. State what was the standing of the Alta California newspaper in this State and city with regard to circulation at that time.

Answer. It was one of the leading papers at that time. I cannot state what its circulation was at that time.

The counsel for the United States declines to ask any questions.

Question. Do you know any other matter relative to the claim in question?

Answer. I do not.

R. C. MOORE.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this 16th day of July, 1857, personally came R. Cutler Moore, the witness above named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth relative to the claim of Alexander Cross against the United States, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of R. Cutler Moore taken at the request of counsel for claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Alexander Cross.

The adverse party attended by consent, and did not object.

TULLY R. WISE,
Commissioner.

Fees of witness.....	\$ 1 50
Commissioner's fees.....	15 00
	\$16 50

A.

FOR LEASE OR RENT—That superior four story building on Battery street, hitherto occupied as the first U. S. bonded store.

This is one of the strongest and most costly edifices in the city, with clear floors 100 by 25 feet, newly painted inside, and most suitable for warehouses, counting rooms, printing offices, or any commercial purpose. Its situation is in the centre of business—it is convenient of access from Sansome street by a private alley, and is most secure against fire risks. There is a private side walk on Battery street of about five feet.

Storage in large parcels taken on moderate terms.

Apply to

au 18-15

CROSS & CO.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this 20th day of July, A. D. 1857, personally came Daniel Gibb, the witness within named, and having been first duly sworn according to law to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States, does upon his oath say, that his name is Daniel Gibb; that he is a merchant; that he is between thirty and thirty-one years of age; that he has resided in San Francisco during the past year; that he has no interest, either direct or indirect, in the claim in question; that he is not related to the claimant in any degree whatever.

Question. Mr. Gibb, are you acquainted with the rates of storage in San Francisco from the 1st of September, 1854, to the 14th of November, 1856; and if you are, what were those rates?

Answer. Is it in free or bonded warehouses? (NOTE.—The counsel for the claimant says, in both, state separately the rates in both. The witness continues.) In free warehouses the current rate has been fifty cents a ton, with occasionally twenty-five cents or fifty cents additional for the first month; in bonded warehouses the current rate has been from one dollar to one dollar and a quarter per ton per month.

Question. Is there any difference, Mr. Gibb, in free warehouses where advances are made upon goods and when advances are not made upon goods?

Answer. A very material difference.

Question. Will you explain what that difference is?

Answer. It is comparatively a matter of extreme difficulty to procure storage without making advances upon goods, or agreeing to do so if required.

Question. Have you stored goods here or received goods on storage; and if so, since when?

Answer. I have been doing both since 1849.

Question. Mr. Gibb, are you the same Daniel Gibb who is at present President of the Chamber of Commerce of San Francisco?

Answer. Yes.

Question. Can you state what has been the expense per ton of receiving and delivering goods on storage between September 1st, 1854, and November 14, 1856?

Answer. Yes; it has been on the average not less than sixty cents per ton in two story buildings of ordinary construction, with ordinary facilities for taking in goods.

Question. Do you know Cross's warehouse on the west side of Battery street, between Jackson and Pacific?

Answer. I do.

Question. What would be the expense during the period last mentioned of receiving and discharging goods per ton in the most northerly of the three warehouses belonging to Cross, last mentioned?

Answer. Being a lofty building, the average expense, in my opinion, would be not less than sixty-five cents per ton.

The counsel for claimant here closed, and the counsel for the United States took the witness.

Question. How long have you resided in San Francisco?

Answer. With the exception of two visits to Europe, occupying together sixteen or seventeen months, over eight years.

Question. Has Mr. Joseph Clark, the witness who previously gave his testimony in this cause, conversed with you in regard to the testimony which was desired from you, or in regard to the facts about which you have just testified?

Answer. Very little. He asked me whether I knew the current rates of storage during the time I had been here, and whether I would be willing to testify to my knowledge of the facts in a case in which Mr. Cross is interested. I told him that the nature of my business

made me perfectly conversant with the facts, and that if he would not take up too much of my time I had no objection to testifying.

Question. Did the conversation which you have just related take place before to-day?

Answer. Yes; some days ago he made that request of me.

Question. Were the rates of storage and the cost of receiving and delivering goods mentioned by him or you at that interview?

Answer. Yes; it was on these points that he told me that my evidence would be required.

Question. Has he not conversed with you on the subject of your examination, and in regard to the testimony given by the previous witness, Falkner, in this room, whilst we were examining the said witness, Falkner?

Answer. No; not beyond some passing remarks which I made to him with regard to one or two points of Mr. Falkner's testimony, or rather the questions put to Mr. Falkner on the cross-examinations.

Question. Did you store goods or receive goods on storage in San Francisco, during the year 1854?

Answer. Yes; both.

Question. In free or bonded warehouses?

Answer. I received goods in free warehouses, and stored goods in both bonded and free warehouses.

Question. Were not goods during that year, and have they not since, prior to November 14th, 1856, been stored in San Francisco in free warehouses at as high rates as one dollar per ton?

Answer. Not generally; in exceptional cases, they may have been for small lots of goods, or where money lenders advanced on the goods and made their own terms as to storage.

Question. Is not the warehouse in question a desirable one in point of location, and one likely to be easily rented and generally kept filled?

The counsel for claimant objects to the question, because it was not the subject matter of the direct examination.

Answer. It is moderately well situated; there are many warehouses better located, and others of course worse; ever since the building mania of 1853, which prevailed in San Francisco, it has been a matter of great difficulty to rent warehouses or to keep them full of storage. The storage business has been chiefly conducted by parties who made it their business to advance money on goods in addition to storing them.

Question. Are you acquainted with the claimant?

Answer. I am.

Question. Intimately; and with his business?

Answer. I am personally acquainted with him, but cannot say that I am intimately acquainted with any man's business except my own; I may further say that, we are rivals in trade, and not likely to be confidential with each other.

Question. Were you acquainted with him before he or you came to San Francisco to reside?

Answer. I knew him slightly in Valparaiso; he was then the head of a house and I was a clerk in another house.

Question. Are you a countryman of his?

Answer. By birth, I believe; he is a British subject and I am now a citizen of the United States.

Question. Of what country are you a native?

Answer. I am a native of Scotland.

Question. Of what country is he a native?

Answer. I believe he is a Scotchman, also.

Question. Did Messrs. Cross & Co. make advances on goods received on storage in their warehouse in the years 1854, 1855 and 1856, in San Francisco?

NOTE.—The counsel for claimant objects to the question, as irrelevant.

Answer. I do not know.

Question. Did you make advances on goods stored with you during those years?

Answer. Some times when I had money to lend.

Question. Did you receive goods on storage during either of those years when you did not make advances?

Answer. Very seldom, such not being my general business.

Question. What was your general business?

Answer. Importer and commission merchant, trading with most parts of the civilized globe; also, ship owner, money lender, real estate owner.

The counsel for the United States here closed, and counsel for claimant takes the witness.

Question. There is an apparent ambiguity, Mr. Gibb, between your cross-examination and your direct-examination, where you say in the latter that taking goods on storage is not your general business, will you state more fully this ambiguity, and state whether you have done much in storing goods and taking goods on storage, between the period of 1st September, 1854, and 14th November, 1856?

Answer. During that whole period I have been constantly receiving large quantities of goods on consignment from foreign countries, and from eastern domestic ports, as well also on account of my firm of Daniel Gibb & Co., these goods including many entire cargoes of coffee, rice, sugar, and other merchandise; such goods I have frequently sold on arrival, stipulating with the purchasers to store them for their account, and charging them storage therefor; I have also stored large quantities of flour from a mill which I owned in Stockton, and on which flour I advanced money to the tenants from the mill, and also, sometimes received flour from them without advances. It has also been the custom in my business to sell large invoices of goods at wholesale, on which I received storage from the purchasers, so that although my business was not generally speaking that of a store keeper, yet in various ways I have done a large amount of storage business.

Question. Do you know any other matter relative to the claim in question; if you do state it?

Answer. Nothing else.

DANIEL GIBB.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this twentieth day of July, A. D. 1857, personally came Daniel Gibb, the witness within named, who having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Daniel Gibb, taken at the request of counsel for claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Alexander Cross. The parties appeared by counsel; and Mr. Emmett acted as counsel for claimant and Mr. Townsend as counsel for the United States.

TULLY R. WISE,
Commissioner.

Fees of witness.....	\$1 50
Travel.....	—
Attendance	—
Commissioner's fees.....	15 00
	16 50

The fees charged here are more than the law of Congress allows.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this twentieth day of July, A. D. 1857, personally came Evelyn R. Falkner, who having been first sworn according to law to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States, does upon his oath say that his name is Evelyn R. Falkner; that he is a merchant and insurance agent; that he is forty-three years of age; that he has resided in the city of San Francisco since 1848; that he has no interest, either direct or indirect, in this claim; that he is not related to the claimant in any degree whatever.

Question. Are you acquainted with Cross' warehouses on Battery street?

Answer. Yes.

Question. Are you informed on the value of property and the rents of property in the city of San Francisco in the year 1850?

Answer. Yes sir.

Question. Have you been in the warehouse farthest north, where Southgate & Co. are?

Answer. Yes, sir.

Question. What was a fair rent for that entire building in the year 1850?

The counsel for the United States objects to the question on the ground of irrelevancy. The counsel for the claimant withdraws the question.

Question. Mr. Falkner, are you acquainted with the rates of storage in the city of San Francisco from September 1, 1854, to November 14, 1856? and if so, state what were the current rates.

Answer. Yes, sir; I am acquainted with them. Seventy-five cents per ton per month would be an average. Goods may have been taken as low as fifty cents per ton per month; but then some were as high as one dollar.

Question. Can you state, sir, during the same period, what would be the expense of receiving and delivering goods on storage in the building in question?

Answer. Yes, sir; not less than sixty-two and a half cents a ton certainly, and more like seventy-five.

The counsel for claimant here closed and the counsel for the United States took the witness.

Question. Are you, or have you been since you have resided in San Francisco, the owner of any warehouse or warehouses or engaged in the storage of goods for hire?

Answer. I have been the owner of one and a half warehouses; one stood entirely in my name and I had a half interest in another; that was in the years 1853 to 1856. The half interest was from the year 1853 to 1856, and the whole warehouse was from 1855 to 1856. These buildings were leased to other parties who received goods on storage; we did not take goods ourselves in these buildings, I mean my firm, but we frequently sent goods there ourselves on storage. I, or we the firm of Falkner, Bell & Co., have been receiving goods on storage in the store occupied by us in California street since February, 1855, I think it was.

Question. Was there any difference in the prices of storage in the years 1853, 1854, 1855, and 1856, in San Francisco?

Answer. There may have been a very slight difference of a few cents a ton.

Question. Was the difference slight, if any?

Answer. Yes, sir.

Question. Was there any difference or any perceptible difference in the rent of warehouses used for storage, in San Francisco, in the same years 1853, 1854, 1855, and 1856?

Answer. Yes, a slight decline from year to year.

Question. Was that decline but very slight?

NOTE.—The counsel for claimant objects to the question as matter that did not form the subject of the direct examination.

Answer. The decline would be proportionate to the size of the building. I know that in our case we got a deduction of five and twenty dollars per month from the rent of 1855.

Question. Were goods stored as high as the rates mentioned in the direct examination during the year 1856, mentioned by you?

Answer. Yes, sir.

Question. Were many goods stored as high as a dollar per ton per month?

Answer. Yes, sir; and even to the present day in some instances we store at that rate.

Question. Have you had your warehouse or warehouses generally filled with goods during the years, 1853, 1854, 1855, and 1856?

NOTE.—The counsel for claimant objects to the question because it was not the subject matter of the direct examination.

Answer. Yes, sir.

Question. Did you have any difficulty in keeping your warehouses filled at the rates you have mentioned during those years?

NOTE.—The counsel for claimant makes the same objection to the question as to the last.

Answer. Yes, occasionally we had.

Question. Is the warehouse in question as well or better located than yours for obtaining storage?

NOTE.—The counsel for claimant urges the same objection as to the last question.

Answer. Yes, sir, better.

Question. Have not the prices of labor and consequently of receiving and delivering goods diminished or decreased since 1854?

Answer. Very little.

Question. Has there been any difficulty in San Francisco in leasing a warehouse as eligibly situated as the one in question since the first of September, 1854, to the 14th of November, 1856?

NOTE.—The counsel for claimant objects to the question because it was not the subject of the direct examination.

Answer. I should think not much.

Question. Has there been any difficulty during the same period in keeping a warehouse as eligibly situated as that filled with goods on storage?

NOTE.—Counsel for claimant urges the same objection as to the last question.

Answer. Yes, occasionally.

Question. Has there been generally?

NOTE.—The counsel for claimant urges same objection as to last question.

Answer. No, not generally.

Question. Is not the warehouse in question one of the most eligibly situated in the city for obtaining a tenant, or for obtaining goods on storage?

NOTE.—The counsel for claimant objects to the question; first, because it was not the subject of the direct examination, and second, because it is leading.

Answer. Not the most, I should say; not one of the most.

Question. What, according to the current rates of rents of warehouses in San Francisco, would the ground floor of the warehouse in question have brought from the 1st of September, 1854, to the 14th of November, 1856?

NOTE.—The counsel for claimant objects to the question, because it was not the subject-matter of the direct examination.

Answer. About two hundred and fifty dollars per month.

The counsel for the United States here closed, and the counsel for claimant again took the witness.

Question. Mr. Falkner, to obtain storage from the 1st of September, 1854, to the present time, has it not been necessary for the persons taking goods on storage to make advances upon the goods?

NOTE.—The counsel for the United States objects to the question so far as it relates to the period of time, from the 14th of November, 1856, to the present day, as irrelevant.

Answer. Very frequently; it greatly facilitated filling the store.

Question. You testified, Mr. Falkner, that you had your warehouses generally filled with goods during the years 1853, 1854, 1855, and 1856. Did you make advances on those goods?

Answer. That is our principal business, advancing on goods.

Question. During that period, sir, was a warehouse of the size of the one in question likely to be filled with goods on storage if the proprietor did not make advances upon the goods stored?

Answer. It was always a great objection to storing goods unless the parties knew they could obtain advances. People requiring advances always prefer a storehouse where they can get it, to one where they cannot get advances.

The counsel for claimant having finished, the counsel for the United States again takes the witness.

Question. Were there not great quantities of goods arriving in San Francisco in the years 1853, 1854, and later, so that storage was during these years plenty.

NOTE.—The counsel for claimant objects to the question, because it was not the subject matter of the direct examination.

Answer. I really can't tax my memory, sir, for so long a period.

Question. Do you know anything else relative to the claim in question, if you do state it?

Answer. No, sir.

E. R. FALKNER.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this 20th day of July, A. D. 1857, personally came E. R. Falkner, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the same in the presence of the commissioner. The deposition of E. R. Falkner, taken at the request of the counsel for claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Alexander Cross. The parties attended by consent. Mr. Emmet appeared as counsel for claimant, and Mr. Townsend as counsel for the United States.

TULLY R. WISE,
Commissioner.

Fees of witness.....	\$1 50
Travel	
Attendance.....	
Commissioner's fees.....	15 00
Total.....	<u>16 50</u>

STATE OF CALIFORNIA, }
 City and County of San Francisco, } ss.

On this 29th day of December, A. D. 1857, personally came before me John H. Wise, who having been first sworn according to law to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Alexander Cross against the United States, does upon his oath depose and say that his name is John H. Wise; that he is deputy collector of the port of San Francisco; that he is twenty-eight years of age; that he has resided in San Francisco during the past year; that he has no interest, either direct or indirect, in the claim of Alexander Cross against the United States; that he is not related to the claimant in any degree whatever.

Question. What is your present occupation?

Answer. I am at present deputy collector of the port of San Francisco,

Question. Have you recently examined the files of papers in the custom-house of the port of San Francisco? or state about when?

Answer. I have examined all the files of papers in the collector's room, and those files of papers comprise all the correspondence with the Treasury Department, at Washington.

Question. Do they comprise all the official correspondence between the collector and other parties?

NOTE.—The counsel for the United States objects to the question as leading.

Answer. They do not comprise all; they do not comprise auditor's accounts, which are filed in the auditor's office, and certain other accounts.

Question. With what object did you make that search?

Answer. With regard to a protest of Cross & Co., when notified by Major Hammond, then collector, that his warehouse was discontinued as a bonded warehouse by order of the Secretary of the Treasury.

Question. Look at the paper now shown you, and marked exhibit A, and state if it was the original of which the paper shown you is a press copy, which you were directed to search for, and which you did search for?

NOTE.—Counsel for United States objects to the question as leading.

Answer. I was directed to search for the original of which this purports to be a press copy; this is the paper which was shown me at the time; I mean exhibit A.

Question. Did you find such original?

Answer. No, I did not.

Question. Were the files of which you have spoken the proper place to find a letter of that character?

Answer. Yes.

Question. Did you find any letter from Alexander Cross to Richard P. Hammond, collector, among those files?

Answer. I don't recollect now, but I am positive there was nothing bearing upon the subject of this protest from Cross.

Question. By whose direction did you make that search?

Answer. By the direction of the present collector, Colonel Washington.

Question. Can you state whether there are any papers or letters missing from those files which, to your knowledge, should be amongst them?

Answer. The letters from the Secretary, as for instance, are numbered, and, in examining the files, I find several numbers are missing, and it is the same with regard to the other correspondence; but it is not in my own knowledge whether those letters ever came to this place or not.

The counsel for claimant here closed, and counsel for the United States took the witness.

Question. How do you know that the files in the collector's room comprise all the correspondence with the Treasury Department, and that there may not be other files of correspondence with said department elsewhere?

Answer. In examining the files I find the greater part of the correspondence with the department from the time of the first collector down to the present time, and, upon inquiry, I find that none of the other officers in the custom-house have any in their possession.

Question. Do you know that none of the other officers in the custom-house have any of them in their possession otherwise than from the information of such officers?

Answer. No, I do not; but if they have them in their possession, they must have taken them from the vaults in the absence of those who belong to the collector's room.

Question. Why do you arrive at this conclusion?

Answer. Because all the letters come to the collector first, and he knows the correspondence with the department.

Question. Does he never, on any occasion, allow letters to be taken from his room?

Answer. I do not know what the practice has been with former collectors, but the present collector allows it, but a memorandum is kept of it.

Question. How many letters did you find missing from the files in the collector's room, and in what year?

Answer. That I took no account of; but there is none missing from the time since Washington came into office.

Question. Can you not state about the number missing?

Answer. No; I have no conception, as I never examined the records with regard to that.

Question. How long have you been in the collector's office at San Francisco?

Answer. Three or four months; I don't recollect the exact time.

Question. Were you ever employed in a custom-house previous to your employment here at San Francisco?

Answer. No; I never was employed in any other custom-house than this.

Question. Who has charge of the papers in the collection room?

Answer. I have charge of them.

Question. Is there correspondence with the Treasury Department on file, in the auditor's office in the custom-house at San Francisco, relating to accounts or other matters?

Answer. There is no correspondence with the Treasury Department that I know of; those letters ought to be on file in the collector's room.

Question. When did you make the search of which you have spoken?

Answer. About ten days since.

Question. How long were you engaged in making such search; and did you look carefully through all the files of correspondence in the collector's office?

Answer. I do not know the time, but I examined every file and every paper, and it is certainly not in that office. I found letters from Major Hammond, before and after the date of exhibit A, and Mr. Cross's letter ought to have been in one of two packages, if it had been in the collector's room, as Major Hammond's letters referred to Mr. Cross' warehouse.

Question. Do you know any thing else relative to the claim in question; if you do, state it?

Answer. I know nothing in regard to the claim, except that I found in examining the press letter book, kept by Major Hammond, a letter addressed to the Secretary of the Treasury, James Guthrie, in which letter the collector refers to the protest of Mr. Cross, and I gave a copy of it to Mr. Clark for Mr. Cross. The letter is certified to by the collector as being a true copy.

JOHN H. WISE.

STATE OF CALIFORNIA,

City and County of San Francisco, ss.

On this 29th day of December, A. D., 1857, personally came John H. Wise, the witness within named, and after having been first sworn to tell the truth, the whole truth and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness who then subscribed the deposition in the presence of the commissioner. The deposition of John H. Wise taken at the request of Mr. Emmet, counsel for claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Alexander Cross. J. B. Townsend

attended as counsel for the United States, by consent, and did not object.

TULLY R. WISE, *Commissioner*.

SAN FRANCISCO, *August 13, 1853.*

SIR: I have to acknowledge the receipt of a letter from you under date August 4th, apprising me that in obedience to instructions from the Secretary of the Treasury you will on the 13th instant give up the possession of my warehouse, on Battery street, and not pay any rent for it after that date.

I do not recognise a right in the Secretary of the Treasury to rescind my contract with the government in reference to said warehouse, and I shall therefore claim payment of rent pursuant to said contract until the expiration of the term for which the building was leased.

Respectfully your obedient servant,

ALEXANDER CROSS.

RICHARD J. HAMMOND, Esq.,
Collector of Customs.

STATE OF CALIFORNIA,

City and County of San Francisco, ss.

I, Tully R. Wise, a commissioner appointed by the Court of Claims to take testimony to be used before said Court, do hereby certify, that the depositions of Joseph Clark, Richard P. Hammond, and John H. Wise were taken before me to be used in the claim of Alexander Cross against the United States; that all the witnesses referred to exhibit A, annexed to the deposition of John H. Wise. That this is the identical paper referred to by all of said witnesses, and that I have put my name to it as did all the witnesses, viz: Richard P. Hammond, Joseph Clark, and John H. Wise.

TULLY R. WISE, *Commissioner*.

Commissioner's fees, \$8.

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT, *June 2, 1857.*

Pursuance to the act of Congress of 22d February. 1894 I hereby certify that the annexed are true copies of the originals on file in this department.

In witness whereof, I have hereunto set my hand and caused the
[L. S.] seal of the Treasury Department to be affixed, on the day and
year first above written.

HOWELL COBB,
Secretary of the Treasury.

OATH OF OFFICE.

I, Thomas Butler King, having been appointed to the office of collector of the customs for the district of San Francisco, in the State of California, do solemnly, sincerely, and truly swear that I will diligently and faithfully execute the duties of the said office of collector, and will use the best of my endeavors to prevent and detect frauds, in relation to the duties imposed by the laws of the United States. I further swear that I will support the Constitution of the United States.

T. BUTLER KING, *Collector.*

Sworn to and subscribed this 31st day of October, 1850, before me.
Witness my hand and seal.

SAM. R. BETTS, [L. s.]
U. S. Judge, Southern District of New York.

TREASURY DEPARTMENT,
Comptroller's Office, November 1, 1850.

SIR: Your official bond having been received and approved, your commission as collector is herewith transmitted. Inasmuch as there is a question about the legality of your oath of office endorsed thereon, taken before the judge of the district court for the southern district of New York, you are required, before entering upon the duties of your office, to take another oath of office within the collection district, before some judge or magistrate authorized to administer oaths therein, and have the official character and signature of such officer duly certified by the clerk of a court of record of the proper county, under his seal of office, in accordance with the form of oath and certificate and the instructions at the bottom of the blank bond herein enclosed; and you will please to transmit the same, so certified, forthwith to this office; and on so doing, James Collier, esq., your predecessor in office, will deliver to you, on application, all the public money and other public property, books, papers, &c., as well as instructions relative to the duties of the office, with which he has been furnished by this department; for all of which you will give him duplicate receipts, specifying every article.

Very respectfully, your obedient servant,

E. C. SEAMAN,
Acting Comptroller.

T. BUTLER KING, Esq., *New York.*

UNITED STATES OF AMERICA,
State of California, District of San Francisco.

I, Thomas Butler King, having been appointed collector of the customs for said district, solemnly, sincerely, and truly swear, that I will diligently and faithfully execute the duties of said office of collector, and use the best of my endeavors to prevent and detect frauds in re-

lation to the duties imposed by the laws of the United States, I further swear that I will support the constitution of the United States.

T. BUTLER KING.

Sworn to and subscribed before me, this eighth day of January, in the year one thousand eight hundred and fifty-one.

LEVI PENSONS,

Judge of the 4th district court.

TREASURY DEPARTMENT,

Office of Commissioner of Customs, June 2, 1857.

I hereby certify that the annexed papers are true copies of the originals on file in this office, to wit: Oath of T. Butler King, collector of customs for the district of San Francisco, in the State of California, dated the 31st October, 1850; letter of E. C. Seaman, acting Comptroller, dated the 1st November, 1850, addressed to T. Butler King, at New York, and oath of T. Butler King, dated the 8th January, 1851.

H. J. ANDERSON, *Commissioner of Customs.*

The SECRETARY OF THE TREASURY.

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT,

June 2, 1857.

Pursuant to the act of Congress of February 22, 1849, I hereby certify that the annexed is a true copy of a letter from the Secretary of the Treasury to the collector of the customs at San Francisco, California, dated April 12, 1853; from the records of this department.

In witness whereof, I have hereunto set my hand, and caused the [L. s.] seal of the Treasury Department to be affixed on the day and year first above written.

HOWELL COBB,

Secretary of the Treasury.

TREASURY DEPARTMENT, *April 12, 1853.*

SIR: The leases and contracts for five warehouses at San Francisco, California, coming before me for consideration and directions to the collector, I have carefully read and considered the 21st section of the act of the 2d March, 1799, and find it invests the several officers of the customs with the powers enumerated, and, amongst others, declares "they shall, with the approbation of the principal officer of the Treasury Department, provide, at the public expense, storehouses for the safe-keeping of goods, and such scales, weights and measures as may be necessary."

The act of April 20, 1818, declares that "wines and distilled spirits shall be deposited in such public and other warehouses, at the expense and risk of the importer, as shall be agreed upon between the surveyor and inspector."

The act of the 3d March, 1841, provides that all stores thereafter rented by the collector, naval officer, or surveyor, shall be on public

account, and paid for by the collector as such, and be appropriated *exclusively* to the use of receiving foreign merchandise, subject, as to rates of storage, to regulations by the Secretary of the Treasury.

The warehousing act of the 6th August, 1846, making all duties payable in cash on importation, except when the importer should warehouse them, in which case they are to be deposited in the public stores, or other stores, as agreed upon between the collector and importer.

By the 5th section of that act, authority is given to the Secretary of the Treasury to make such rules and regulations, not inconsistent with law, as shall be necessary to give full effect to the provisions of the act and have a just accountability.

By virtue of this authority, R. J. Walker, Secretary of the Treasury, on February 17, 1849, issued a circular in *lieu* of all former circulars upon the subject of warehousing goods, in which directions are given for all the proceedings necessary to place goods in warehouses, for the selection of warehouses, and provides that all the selections should be subject to the approval of the Secretary of the Treasury.

The foregoing are all the laws giving collectors authority to rent stores or warehouses and the rent and selections are required to be subject to the approval of the Secretary.

The authority is given to the collector and not to the Secretary. The collector is to rent and select, and the Secretary to approve. There is no authority given to the Secretary to rent, and no authority to the collector to approve.

The agreement of July 28, 1851, between Thomas Corwin, Secretary of the Treasury, and James Eldredge, for building and the rent of stores from the time they should be completed, at \$1,500 per month each, is made without authority of law, and is not binding on the United States, or this department, or the collector; and the same may be said of the agreement under date of the 24th February, 1853, between Theodore Adams and Thomas Corwin, for constructing a building for appraiser's store and office is for ten years at \$2,083 per month.

The agreement made on December 31, 1853, between Beverly C. Saunders, collector, and Geogan & Lent, for the rent of a building, at \$1,500 per month, for one year, from January 1, 1853, to continue from month to month until terminated by notice from either party, was approved by W. L. Hodge, Assistant Secretary of the Treasury, and is a lease warranted by law, and to which no just exception appears. It is in the power and will be the duty of the collector to terminate it when he deems the rent too high or the building no longer needed.

The agreement between Daniel Saffarans and James Collier, under date of the 28th of April, 1849, appears to have been made in Hamilton county, Ohio, for the building by Saffarans of a fire-proof building at San Francisco, on a site to be selected by said Collier, and the lease of it for fifteen years at a rent of \$, which contract was approved by William M. Meredith, Secretary of the Treasury, on condition that the rate of rent to be paid for the building should be agreed upon by the collector and approved by the Secretary, and the rent stipulated for to depend upon, and to be paid out of

appropriations expressly made by Congress for the purpose, and from no other service, or according to existing laws at the time of payment.

The supplemental agreement to give effect to the proceeding under date of the 11th of November, 1850, between T. Butler King and Daniel Saffarans, recites the building was completed; that the collector and King had contracted to rent said warehouse for 15 years, at \$2,000 per month; that the contract was sent to Washington, and Thomas Corwin disapproved of the rent at \$2,000 per month. On the 11th of November, 1850, it appears the rent was fixed at \$1,800 per month, for ten years from taking possession, between the owners and T. Butler King.

T. Butler King was appointed collector on the 14th of October 1850, and the law requires he should, before entering on his duties, take the oath of office in his collection district. He was in Washington at the time of his appointment, and had not, on the 11th of November, 1850, given bond or taken the oath of office, and was consequently not collector. He was in the same condition when the supposed agreement for a rent of \$2,000 per month was made.

The law requires the sworn collector to make these contracts, and he must be sworn in the district; and he ought to see the houses he rents, and know the value of the rent from actual personal knowledge. He was not a collector when the rent was fixed at \$1,500 per month, and was not in the district, and had not the knowledge, and could not know the value of the property, or its adaptation to the public use. This pretended lease is not binding on the United States.

The agreement made on the 7th day of June, 1852, between Thomas Butler King, collector, and Palmer, Cook & Co., bankers, for leasing fire-proof buildings for custom-house and naval offices, at \$3,000 per month, to continue until the custom-house now in course of construction, should be finished, appears to have the approval of Thomas Corwin, Secretary, without date.

I have reliable information that the cost of this house to the lessors, including ground, did not exceed \$——, and that the rent is about three times as much as it is fairly worth, and the house not adapted to the business, and inconveniently situated for a custom-house. The presumption of fraud from these circumstances is so strong that I feel it my duty to require the collector, on reaching California, to investigate the facts in relation to this case, what was the value of the property at the date of the lease, and what would have been then a fair rent for the property; and whether the property is convenient and suitable for the business, and any other facts in any way impeaching the fairness of the lease, and report them to me, with the names of such witnesses as can be relied upon to establish them, and their written statements when practicable; and you are authorized to cancel this lease, if the lessors will do so.

The collector will abandon the premises mentioned in the agreement with James Eldredge, and also that with Palmer, Cook & Co., and that with Daniel Saffarans, and notify the lessors, respectively, that rent will no longer be paid for said buildings, and that said pretended leases are held void.

The collector will also notify Theodore Adams that the contract under date of the 24th of February, 1853, is deemed void, and not

binding on the United States, and that possession will not be taken of the premises, if built, and no rent will ever be paid for the same.

These notices will all be made in writing, and copies delivered by an officer, and returns made on the original of the fact of service, in duplicate, with the date, and one copy returned to this department and the other retained in your office.

The collector will rent, subject to the approval of the Secretary of the Treasury, all such convenient stores and warehouses as he shall find necessary for the collection of the customs at the port of San Francisco, and at such rent as shall be fair and reasonable; and in all such leases provision shall be made to terminate the same upon reasonable notice, not exceeding three or six months.

The charge of storage in the public warehouses and stores at the port of San Francisco should not exceed the usual and fair charges of storage in private stores and warehouses at that port, and the charges for lighterage and drayage should not exceed the actual charges of the persons performing the same; and lighterage and drayage shall be left open to free competition.

JAMES GUTHRIE, *Secretary of the Treasury.*

R. P. HAMMOND, Esq., *Collector of San Francisco.*

TREASURY DEPARTMENT, *June 23, 1857.*

In addition to the papers transmitted to your chief clerk on the 3d instant, under your order of the 21st ultimo, in the case of Alexander Cross *vs.* The United States, I herewith transmit the copy of a letter from Richard P. Hammond, collector, to the Secretary of the Treasury dated August 15, 1853, reporting that he had served notice upon Mr. Cross, the assignee of Saffarans. It being suggested that the counsel of Cross desire a copy of the reply of Cross to this notice, stated to bear date the 13th of August, 1853, I have to state that the collector does not mention having received any such reply, and this department is not in possession of any information in regard to it.

HOWELL COBB, *Secretary of Treasury.*

TO THE COURT OF CLAIMS.

No. 32.]

CUSTOM HOUSE, SAN FRANCISCO,
Collector's office, August 15, 1853.

SIR: I have the honor to inform you that I have in obedience to your instructions, dated April 12, 1853, abandoned the store leased from Daniel Saffarans, and transmit herewith a copy of the notice served upon Mr. Cross, the assignee of Saffarans. The bonded merchandise which was stored in that warehouse has been transferred to a store of brick, fireproof, which has been bonded by Messrs. Hall & Co., on the corner of Green and Battery streets. The unclaimed merchandise has been removed to Eldredge's stores corner of Union street. That which has been in store over nine months will be sold at auction on the 22d instant.

I have the honor to be, very respectfully, your obedient servant,

RICHARD P. HAMMOND, *Collector.*

Hon. JAMES GUTHRIE, *Secretary of the Treasury, Washington, D. C.*

TREASURY DEPARTMENT,
April 18, 1856.

GENTLEMEN: I have examined the statement you left of the claim of Alexander Cross, assignee of Saffaran, and the one you enclosed under date of the 11th instant, and mark they do not conform to each other, nor my understanding of the case. If the account of \$12,130 29 rent paid up to June 1, 1855 was correct, Mr. Cross could, at the utmost, claim the excess of rent over the sum received, and interest on the balance until paid. But that is not correct; because Mr. Cross, I understand, occupied part of the premises himself, and does not account for the use of the part occupied.

In relation to the estimate of what rent the property would yield from June 1, 1855, to the end of the time claimed, the estimate of \$300 per month as in the first statement, or \$200 as in the last, is far below the actual worth of the property. Rents in San Francisco have not been reduced more than one-third, according to the best evidence the department has received. If you take \$500 per month as the loss for the whole time claimed, it would not, with interest, reach the amount supposed in either statement, whilst the mode of making the interest account gives more than Mr. Cross could rightly claim.

If the contract of lease was binding on the government, 92 months is the most that could be demanded, less the fair use of their property, by Mr. Cross, since he went into the use of it, after it was given up by the government. The claim on this predication would be for 92 months \$46,000, with interest, which, for convenience, is cast up to the 13th instant, on the gales past due; making 32 months, and interest deducted from the gales to fall due; leaving, on the 13th inst., the sum of \$42,780.

I have had reference to the accounts of the Collector of San Francisco upon the subject of rents paid for warehouses, and storage received, and expenses incurred about the care of the warehouses and custody of the goods, and find the rent paid per annum, including the Saffaran warehouse, amounted to \$79,000; and the storage per annum received to \$33,570 04, and the expenses per annum to the sum of \$84,994 80, showing a clear loss to the government per annum of \$130,224 66. This was for the year 1851, and the figures were worse for the government in 1852 and 1853.

I make this statement in contradiction to the supposition that the first years of the lease was, or could have been a source of profit to the United States. In fact, the records show it was needless, if not worse, to have United States warehouses on the west coast.

After a full examination you will see that it would be impossible to accept your verbal proposition to pay Mr. Cross \$60,000, even if the contract to build and lease was not fraudulent.

I am, very respectfully,

JAMES GUTHRIE,
Secretary of the Treasury.

Messrs. CHAUNCEY & ASPINWALL.

Letter of McAllister to Guthrie, Secretary of the Treasury.

SIR: In behalf of and as attorney of Alexander Cross, a merchant of San Francisco, I submit the following statement in relation to a contract made on the 11th of November, 1850, by T. Butler King, collector of the port of San Francisco, and one Daniel Saffarans, of Tennessee, for the lease of a building in San Francisco, to be used for custom-house purposes, which contract has been assigned to Mr. Cross, under the circumstances hereinafter detailed, with the assent of Mr. King, as collector, and which contract was repudiated by a general order issued from your department, setting aside all contracts made in San Francisco for the renting of buildings in that city to be used for custom-house purposes.

I entertain the hope that, when your attention is called to the particular contract under consideration, you will promptly repair the injustice which has been done, unintentionally, in this instance.

The facts are, that Mr. Cross, a citizen of Great Britain, who had mercantile transactions in San Francisco, was applied to in the city of London, in October, 1849, by George W. Saunders, esq., (recently consul at that place,) in behalf of Daniel Saffarans, of Tennessee. Mr. Saunders exhibited to Mr. Cross articles of agreement entered into between James Collier, collector of the port of San Francisco, and the said Saffarans, on the 28th day of April, 1849, and approved conditionally by Mr. Meredith, then Secretary of the Treasury of the United States, on the 8th of May, 1849, which contract provided for the construction, by said Saffarans, of a building in the city of San Francisco on or before the 1st of September, 1850, to be used for custom-house purposes. The object of Mr. Saunders, the agent of Mr. Saffarans, was to obtain from Mr. Cross the pecuniary means of carrying the said articles of agreement into effect. The result of the negotiation was, that Mr. Cross agreed to advance the capital and construct the required building, receiving for his compensation ten per cent on the amount invested. In pursuance of such agreement, Mr. Cross constructed the building at a cost in money of between ninety and one hundred thousand dollars. Subsequently Mr. Meredith, then Secretary of the Treasury, having disapproved of the amount of rent reserved by the article of agreement exhibited to Mr. Cross by Mr. Saunders, (two thousand dollars per month for a term of fifteen years,) a further and new agreement was made on the 11th of November, 1850, by T. Butler King, collector of the port of San Francisco, and the said Daniel Saffarans, which, referring to the old agreement of April 28, 1849, and to the fact of the disapproval, by Mr. Meredith, of the amount of rent reserved in it, admitting that a building "of the quality and dimensions stipulated in said contract had been erected," and stating that the government was in much need of said "iron building," stipulates to rent it for ten years from the day when the possession of it shall be given to the then collector at a monthly rent of \$1,500.

This last agreement was approved by the Hon. T. Corwin, Secretary of the Treasury, upon condition "that the collector, T. Butler King, esq., upon his arrival at San Francisco, shall first examine the

warehouse in question, and duly accept the same as being substantially of the character, description, and dimensions required by the stipulations contained in the former articles of agreement herein referred to."

Subsequently Mr. Cross, having expended some \$90,000 to \$100,000 in the construction of said building, and not having received a dollar, either as compensation or in payment of his actual advances, and Mr. Collector King refusing to pay rent, either to Cross or Saffarans, in consequence of their dispute, found his only resource was to look to the property and the contract of lease for reimbursement. With this view, he entered into a negotiation with Daniel Saffarans for the purchase of the same, and finally on the 10th of July, 1851, obtained for himself an assignment of the lease on paying the sum of \$21,000, thus making his outlay some \$121,000. In addition to this payment of \$21,000, Mr. Cross was constrained to execute and deliver his bond, conditioned that, in case the sum of \$50,000 were paid him in the month of July, 1856, he (said Cross) would reconvey to Saffarans the property and lease.

The acceptance of the building, as required by Mr. Secretary Corwin, was given in writing by Mr. Collector King, who, at same time, after the negotiation between Cross and Saffarans, as above, recognised the assignment from Saffarans to Cross in the following words: "I, as collector of the port of San Francisco, do hereby accept the iron warehouse erected by Alexander Cross upon a part of the water lot, No. 49, on Battery street, now in the occupancy of the United States government as a bonded warehouse, as the warehouse contracted to be built by David Saffarans, as provided in a contract, of which the within is a copy; and I do hereby officially recognise said Cross as landlord, it being understood that I am to incur no individual responsibility in the premises. This acceptance to date as if done January 14, 1851."

The foregoing statement establishes the attitude of Mr. Cross towards this contract, and proves him to be a *bona fide* assignee of this contract for valuable consideration, free from anything (if anything exist) to taint it in its inception.

The only fact which occurs to me as producing the order of cancellation of the lease in question, under which Mr. Hammond, collector of San Francisco, abandoned the premises in question on the 13th of August, 1853, is a communication from Mr. Frank Ward to the department, in which objection is made to the building rented from Mr. Saffarans on two grounds:

First. That it is constructed of iron, and, in the opinion of Mr. Ward, is as inflammable as if it were constructed of wood.

Second. Objection is made to its capacity for holding goods.

I respectfully submit that the examination of and acceptance by Mr. Collector King, in pursuance of the instructions of Mr. Secretary Corwin, is a full answer to the opinions of Mr. Ward. Behind these the department will not go, particularly when the interests of one standing in the attitude of Mr. Cross are to be sacrificed. But if you should not deem the official action of the collector in the premises conclusive, I call your attention to the letter of Messrs. Cross & Co., in reply to Mr. Ward's statement. I would state that Mr. Cross, the

writer, is a gentleman of the highest respectability, whose statements are entitled to implicit confidence. As an act of justice to Mr. Cross I add that I am myself thoroughly acquainted with the building in question, having examined it together with the one adjoining, similar in every respect to it at a time when I desired to purchase the latter. That examination, together with a knowledge of the fact that both buildings had withstood the destructive fire of May, 1851, in which some fifty or sixty brick buildings were destroyed in the vicinity conducted me to the conclusion that better constructed structures and less liable to fire did not exist in San Francisco. As to the confidence to be reposed in any of my own statements I beg leave to refer you to the members of the delegations in Congress from the States of Georgia and California. But if, sir, you desire other testimony, I refer you to the joint statement of John Parrot, esq., Messrs. Tallant & Wilde, and E. D. Keyes, and others. This statement covers the whole ground taken by Mr. Frank Ward. Mr. Parrot is a respectable citizen of San Francisco, and a few years ago was United States consul at Mazatlan. Mr. Wilde, of the firm of Tallant & Wilde, is a brother of the late Hon. Richard H. Wilde, for years a distinguished representative in Congress from Georgia, and E. D. Keyes is an officer in the army of the United States, inferior to none of his brother officers in all that distinguishes the gentleman and honest man. Messrs. Dewitt & Harrison, another signature, is that of a highly respectable American mercantile firm in San Francisco, and Mr. T. O. Larkin, is a gentleman who has acted for years as American consul at Monterey, before the conquest of California.

I herewith hand you copies of the lease, the approval of Mr. Secretary Meredith, the acceptance of Mr. Collector King, of the letter of Mr. Collector Hammond, of the letter of Cross & Co., and the statement of Captain Keyes, and others. I cannot doubt that on the perusal of these documents, and in view of the circumstances of this case you will cheerfully cause justice to be done to Mr. Cross, either by reinstating the contract of lease or compensating him by allowing him the difference between the contract price and the real value of the premises for the period during which the building was in the occupancy of the government. The basis of this calculation will be found in the statement of Messrs. Parrot and others.

Very respectfully, your obedient servant,

M. HALL McALLISTER.

Hon. JAMES GUTHRIE,

Secretary of the Treasury United States, Washington, D. C.

UNITED STATES COURT OF CLAIMS.

ALEXANDER CROSS *vs.* THE UNITED STATES.

Plaintiff's Brief.

The plaintiff in this case submits the following brief of legal points and authorities, on which he relies to maintain his right of action :

1st. That the contract of the 11th of November, 1850, between T. Butler King, collector of the port of San Francisco, for and on behalf of the United States, with the approval thereof by the Secretary of the

Treasury, of the first part, and Daniel Saffarans of the other part, by which said Saffarans leased to the United States for custom-house purposes the warehouse named in the petition, was a valid contract mutually binding on the parties thereto.—(Vide printed petition, pages 1 and 3, exhibits Nos. 5, 6, and 7, pages 14, 15, and 16.)

2d. Where a contract is mutually binding, it can only be dissolved by the consent of both parties, and cannot be dissolved by one without the consent of the other.—(Leigh *vs.* Patterson, 8 Taunt., 540.)

Therefore the attempt of Richard P. Hammond, the collector of San Francisco, by his letter of the 4th of August, 1853, under the instructions of the Secretary, to abandon and repudiate the lease and stop the payment of rent, against the will and without the consent of the lessor, was an act done without warrant of law and void, and in no way impaired the rights of the lessor.—(Vide printed petition, page 4, and exhibits Nos. 13 and 14, page 19.)

3d. The letter of instructions of the Secretary of the Treasury, of the 12th of April, 1853, directing said Hammond to abandon said warehouse and stop the payment of rent, which assigns his reasons for so doing, abounds in errors both of law and fact.

It is erroneous in matter of *law*, in stating that the acts of Congress give to the collector, and not to the Secretary, authority to select and rent warehouses; that the Secretary approves; but, that there is no authority given to him to rent.

It is admitted that the law authorizes a collector of the customs, “with the approbation of the principal officer of the Treasury department,” to provide, at the public expense, storehouses for the safe keeping of goods; (vide 21st sec., of act of 2d March, 1779, vol. 1, Laws United States, 642;) but, it is also true, that the joint resolution of the 14th of February, 1850, (which the Secretary has wholly overlooked,) expressly authorizes the Secretary, in his discretion, to lease such warehouses “as may be necessary for the storage of unclaimed goods or goods which, for any other reason, are required by law to be stored by the government.”—(Vide, 9th vol. Laws United States, 560.)

On this head, it will be claimed by plaintiff, that taking all the laws on this subject together, it is plain, that if a warehouse be leased by a collector with the approbation of the Secretary, given either before or after the execution of the lease, or if it be leased directly by the Secretary or under his direction, the lease is in either case, and in either of these modes, valid and binding on both parties to it.

4th. Said letter of instructions is erroneous in matter of fact, in stating that on the 11th of November, 1850, T. Butler King had not given bond or taken the oath of office; and that therefore, the lease made by him was void.

The fact is, that prior to the 1st of November, 1850, T. Butler King had taken the oath of office before the United States district judge of the southern district of New York; had given bond which was on that day (November 1st) approved by the Comptroller of the Treasury, and his commission as collector, was on the last named day transmitted to him at New York, by mail.

On the 11th of November, ten days afterwards, he entered into the contract now in question, which was on the same day approved by the Secretary of the Treasury.

5th. It will be insisted that T. Butler King having his commission, as collector, and having given bond to the approval of the Comptroller of the Treasury, (see 1st vol. Stat., 705,) the validity of his official acts does not depend upon his having taken or not taken the oath of office.

The act of March 2, 1799, (1 vol. Stat., 641,) provides for the appointment of collectors. The 20th section requires all officers and persons appointed in pursuance of that act to take an oath of office before entering on the duties of their respective offices, and within three months thereafter to transmit a certificate thereof to the Comptroller of the Treasury; and in default of taking the oath or transmitting a certificate thereof, the party failing shall forfeit and pay two hundred dollars.

The law does not declare that the official acts of the officers shall be void in default of taking the oath, which might work great mischief to the public and to innocent parties; but the penalty is imposed on the person of the party in default.

In other words, it will be insisted, that in this case the collector acted by authority of his commission and that the requirement that he should take an oath is directory and not mandatory.—(Jones *vs.* Gibson, 1 New Hamp. Rep., 266; Johnson *vs.* Wilson, 2 New Hamp., 205-'6; Speake *vs.* United States, 3 Cond. Rep., 248.)

In Bac. Ab., title Officer and Offices, letter E, it is said: "If an officer be created by letters patent he is a complete officer before he is sworn, and before an investiture."

6th. The commission of an officer of the United States is conclusive evidence of his appointment, and it amounts to this conclusive evidence when the appointing power has done every thing to be performed by him.—(Marbury *vs.* Madison, 1 Cranch, 157, 158, and 159.)

That an officer is such *de jure*, as well as *de facto*, from the date of his commission, is established by the fact that his salary commences from that date.—(Marbury *vs.* Madison, 1 Cranch, 161.)

7th. If it be necessary that a collector should accept his appointment to constitute him an officer *de jure*, then it will be insisted that the making of this contract, or doing any other official act after the delivery of the commission to him, would in law amount to an acceptance of the office.

8th. When a person has distinctly admitted or recognized the official capacity of another, he cannot afterwards dispute the validity of the appointment; (Johnson *vs.* Wilson, 2 New Hamp., 205-'6;) consequently, the approval of the contract by the Secretary of the Treasury estops the government, as against the lessor, from denying the official character of King.

9th. It is a well-established rule, that where an officer *de facto*—that is to say, one acting under color of office, whether ministerial or judicial—performs official acts, neither the validity of the appointment nor of the acts done, so far as the community or third persons are concerned, can be disputed or denied; this can be done only where the officer himself is a party.—(Jones *vs.* Gibson, 1 New Hamp., 266; Johnson *vs.* Wilson, 2 New Hamp., 206; State of Ohio *vs.* Constable, 7 Ohio Rep., 10; State of Ohio *vs.* Alling, 12 Ohio, 20; State of Ohio *vs.* Jacob, 17 Ohio, 143; Burke *vs.* Elliot, 4 Iredell, 355; Gilman *vs.*

Reddick, 4 Iredell, 368; McKintry *vs.* Tanner, 9 Johns. Rep., 135; People *vs.* Collins, 7 Johns. Rep., 549; 7 Cowen, 402; Fowler *vs.* Bebee, 9 Mass., 231; Riddle *vs.* Bedford, 7 Sargt. & Rawle, 249; 2 Maule & Selwyn, 141; 3 Barn & Ald., 266; 10 Mass., 301.)

In the case of *Wilson vs. Johnson*, Judge Woodbury says that it is well settled that, when the irregularity, whatever it may be, is not punishable at all, or only by a penalty, the acts of the officer are still valid in respect to third persons who may be interested in such acts; they are valid, also, in respect to the public, so that justice may not fail; and, for aught we perceive, the officer himself may be protected under them; on the contrary where the irregularity is by statute expressly made to invalidate the acts of the officer, or where such is the necessary construction, considering the nature of the office and of the irregularity, the officer himself cannot justify those acts in his official capacity.

10th. Upon the general principles of law, the government, by the approval of this contract by the Secretary of the Treasury, and the payment of rent for more than two and a half years, is estopped from denying the validity of the lease, except it might be for fraud in the procurement of it, of which the government was ignorant.

That no demand of payment is necessary when the party refuses to comply with his contract.—(*Walsh vs. Ostrander*, 22 Wend., 181.)

S. F. VINTON,
Solicitor for Plaintiff.

WASHINGTON CITY, *May 28th*, 1857.

IN THE COURT OF CLAIMS.

ALEXANDER CROSS *vs.* THE UNITED STATES.

Judge BLACKFORD'S opinion.

This suit is for rent, and is founded on a lease of a warehouse situated in San Francisco, California. The lease is dated November 11, 1850, and is executed by one Daniel Saffarans, as lessor, and by T. Butler King, collector of the port of San Francisco, on the part of the United States, as lessee. There is an assignment of the lease by the lessor to the claimant, dated July 10, 1851, endorsed on the lease; and there is, on the face of the assignment, the following writing:

“It is agreed that this transfer will not be valid until R. H. Crittenden, Isaac Saffarans, and A. P. Sheldon, endorse on it their approval. This 10th July, 1851.

“DAN'L SAFFARANS.”

It will be observed that the authority to the three persons named, given by said writing, is joint, and not joint and several.

There is a power of attorney of the same date with that of said writing—that is, the 10th July, 1851—to the three persons aforesaid. It is copied into the petition, and there designated as No. 9. That power of attorney authorized those three persons to deliver said assignment, and do some other things, and also to appoint a substitute. But that power, like that contained in said writing, is joint, and not joint and several.

It appears that, on the 25th of July, 1851, Crittenden, one of said three men, undertook, by a separate act, to appoint Geo. W. Guthrie as his substitute, to act for him under said power of attorney from Daniel Saffarans, authorizing said Guthrie to do all that he, Crittenden, could do under said power of attorney of Daniel Saffarans. And it appears, also, that, on the 19th of November, 1851, Sheldon undertook to appoint Isaac Saffarans (B) his attorney, to endorse his, Sheldon's, name and approval on said assignment.

There are on said assignment the following endorsements:

"State of California, county of San Francisco. The undersigned signify their approval to within transfer, by affixing hereto their seals and signatures, this fifteenth (15th) day of September, A. D. one thousand eight hundred and fifty-one.

"ROB'T H. CRITTENDEN, [SEAL.]

"By his att'y, G. W. GUTHRIE,

"ISAAC SAFFARANS, (B) [SEAL.]

"Sealed and delivered in presence of—

"WARD MCALLISTER."

"The undersigned signifies his approval to within transfer, by affixing hereto his hand and seal, this twenty-sixth day of January, one thousand eight hundred and fifty-two.

"A. P. SHELDON, [SEAL.]

"Per ISAAC SAFFARANS, (B)

"*His Attorney in fact.*

"Signed, sealed, and delivered in presence—

"Witness: WARD MCALLISTER."

I am of opinion that the condition to said assignment, which is written on its face, could not be complied with but by the joint act of the three persons named, or by their substitute jointly appointed by them, supposing them to have been authorized to appoint a substitute for the purpose. "It is a general rule of the common law," says Judge Story, "that where an authority is given to two or more persons to do an act, the act is valid to bind the principal only when all of them concur in doing it; for the authority is construed strictly, and the power is understood to be joint and not several."—(Story on Agency, sec. 42.)

The result of this suit depends upon a single question. That question is, has Daniel Saffaran's assignment to Cross of the lease been approved, and said endorsement of the approval made, by the joint act of R. H. Crittenden, Isaac Saffarans, and A. P. Sheldon, or by their substitute jointly appointed by them, supposing they could appoint a substitute for the purpose? That question must be answered in the negative. There is no pretence that there has been any such joint approval or joint endorsement by those three persons or by their substitute jointly appointed by them.

There is on the lease the following endorsement:

“Honorable T. BUTLER KING,
 “*Collector of the port of San Francisco:*

“SIR: Having assigned and transferred to Alexander Cross within contract, you will please pay all back and future rents arising under same to said Alexander Cross.

“I remain, &c.,

“DANIEL SAFFARANS,

“Per attorney, ISAAC SAFFARANS.

“SAN FRANCISCO, *September 15, 1851.*”

There is no evidence of the execution of that paper by Isaac Saffarans; nor is it shown that Daniel Saffarans had ever authorized Isaac Saffarans to sign any such paper or make any such request. There is among the papers a power of attorney by Daniel Saffarans to Isaac Saffarans, dated April 12, 1851, but it confers no such power as is assumed in that paper, nor is that its object. On the contrary, the authority is to collect the rents then due or to become due from the government to Daniel Saffarans; and to buy out Cross' interest in the warehouse, alleged to be twenty-seven and two-thirds hundredths of the whole. The date of this power is about five months before the date of said assignment. There is also a power of attorney by Daniel Saffarans to Robert H. Crittenden, Isaac Saffarans, and A. P. Sheldon, (No. 9, in the petition,) before noticed; but it gives no authority to Isaac Saffarans to sign any such paper as the one in question.

We have not, according to our rules, any special pleading; but I understand that the general issue is considered to be always filed to the petition; and that the claimant can, in no case, recover without proving his cause of action.

The present suit is for rent, and is founded on a lease. The claimant, who sues as assignee, does not prove himself to be the owner of the lease or of the reversion. He, of course, has no cause of action.

IN THE COURT OF CLAIMS.

ALEXANDER CROSS *vs.* THE UNITED STATES.

January 24, 1859.

SCARBURGH, J.

On the 28th day of April, A. D. 1849, Daniel Saffarans entered into a contract with the United States of the following tenor and effect:

Daniel Saffarans, on his part, agreed to erect and finish, in the city of San Francisco, a building of the dimensions and description therein mentioned, so that the same should be ready for occupancy on or before the 1st day of September, A. D. 1850; and to lease the building to the United States for a term commencing on the day when the collector of San Francisco should approve and accept the same, and terminating on the expiration of fifteen years thereafter. And the United States, on their part, agreed to accept a lease of the said building from Daniel

Saffarans for the term above mentioned, at a rent to be determined upon by the collector of San Francisco when he should receive the building, and be payable quarter-yearly on the first day of January, April, July, and October in every year.

This contract was entered into on the part of the United States by the collector of San Francisco, subject to the approval of the Secretary of the Treasury. It was, on the 8th day of May, A. D. 1849, approved by the Secretary of the Treasury on certain conditions, which were endorsed thereon in writing. The third condition was, that the rate of rent to be paid for the building should be agreed upon by the collector, subject expressly to the approval of the Secretary of the Treasury; and the fourth was, that the rent stipulated for should depend upon and be paid out of appropriations expressly made by Congress for the purpose and from no other source, or according to the existing laws at the time of payment.

A power of attorney from Daniel Saffarans to George W. Sanders is endorsed upon the copy of the above mentioned contract on file with the papers of this case.

On the 11th day of November, A. D. 1850, another contract was entered into between the United States and Daniel Saffarans. The latter contract recited that Daniel Saffarans did, on the 28th day of April, A. D. 1849, enter into a contract with the United States for the construction of an iron-proof warehouse of the dimensions and description in the recital mentioned, to be used for custom-house purposes, at the port of San Francisco, under a lease to the United States for the term of fifteen years, and that the contract so recited was approved by the Secretary of the Treasury subject to certain conditions.

The contract of the 11th day of November, A. D. 1850, also recited that Daniel Saffarans had, in fulfilment of his contract first above mentioned, erected an iron fire-proof warehouse in San Francisco, of the dimensions and quality stipulated for therein, and that the collector of San Francisco did, on the day of contract with Daniel Saffarans to rent the same for the term of fifteen years at the rate of two thousand dollars *per* month, but that the Secretary of the Treasury, deeming the rate of rent for fifteen years unreasonable, had disapproved thereof. It also recited, that the United States being much in need of the iron warehouse above mentioned for custom-house purposes in San Francisco, and Saffarans being willing to make some abatement of the terms agreed on in the contract entered into with the collector of San Francisco on the day of , the parties had concluded the following terms:

1. The United States agreed to rent the warehouse from Saffarans for the term of ten years from the day possession should be delivered to the then collector, at a rent of *fifteen hundred dollars* a month, payable monthly by the collector of San Francisco. There were other stipulations, but it is not necessary to mention them here.

The Secretary of the Treasury appended to the contract of the 11th of November, A. D. 1850, the following: "The foregoing articles of agreement are approved upon the following express understanding and conditions—that is to say, that the collector, T. Butler King,

esq., upon his arrival at San Francisco, shall first examine the warehouse in question, and duly accept the same as being substantially of the character, description, and dimensions required by the stipulations contained in the former articles of agreement herein referred to, then this approval is to take effect, otherwise to be null and void."

On the 10th day of July, A. D. 1851, Daniel Saffarrans made and appended to a copy of the contract of the 11th day of November, A. D. 1850, an instrument of which the following is a copy:

"Having sold to Alexander Cross, for a valuable consideration, all my interests hereafter mentioned, I, Daniel Saffarans, do hereby transfer and assign the agreement, of which the foregoing instrument is in substance a copy, with all the rights, rents, and interests accrued or to accrue under or in virtue of the same, to Alexander Cross; hereby placing him to all intents and purposes in my stead as regards said agreement, as though he, instead of myself, had been the original party thereto.

"He taking all the benefits of said agreement, and all its responsibilities, and I do release, quit claim, and convey all my right, title, interest, and lien, if any, and whatever it may be, to the said Cross and his heirs forever.

"The said Cross is hereby entitled and authorized to receive all the rent that has accrued, and is now in arrear, or that may hereafter accrue under said agreement for the house therein mentioned and alluded.

"In testimony whereof I have hereunto set my hand and seal, this tenth day of July, eighteen hundred and fifty-one.

"DAN'L SAFFARANS. [SEAL.]

"Signed, sealed, and acknowledged in presence of the undersigned witnesses:

"H. M. LUSHER.

"C. G. LEONARD.

"JAMES ROSE, JR."

Upon this instrument Saffarrans made the following endorsement:

"It is agreed that this transfer will not be valid until R. H. Crittenden, Isaac Saffarans, and A. P. Sheldon endorse on it their approval, this 10th July, 1851.

"DAN'L SAFFARANS."

On the 15th day of September, A. D. 1851, G. W. Guthrie, professing to act as the attorney of Robert H. Crittenden, and Isaac Saffarans, (B,) made and endorsed upon the instrument last above mentioned (the assignment from Saffarans to Cross) the following:

"The undersigned signify their approval to within transfer, by affixing hereto their seals and signatures, this fifteenth (15th) day of September, A. D. one thousand eight hundred and fifty-one.

"ROBERT H. CRITTENDEN, [SEAL.]

"By his attorney, G. W. GUTHRIE.

"ISAAC SAFFARANS, (B.) [SEAL.]

"Sealed and delivered in presence of—

"WARD MCALLISTER."

On the 26th day of January, A. D. 1852, Isaac Saffarans, (B,) professing to act as the attorney in fact of A. P. Sheldon, made and endorsed upon the above mentioned assignment from Saffarans to Cross, the following:

"The undersigned signifies his approval to within transfer, by affixing hereto his hand and seal, this twenty-sixth day of January, one thousand eight hundred and fifty-two.

"A. P. SHELDON, [SEAL.]
 "Per ISAAC SAFFARANS, (B,)
"His attorney in fact.

"Signed, sealed, and delivered in presence—witness:

"WARD McALLISTER."

On the 10th day of July, A. D. 1851, Daniel Saffarans gave Robert H. Crittenden, Isaac Saffarans, and A. P. Sheldon a power of attorney, of which the following is a copy:

"Know all men by these presents, that I, Daniel Saffarans, of the town of Memphis, in the State of Tennessee, do hereby nominate, constitute, and appoint Robert H. Crittenden, Isaac Saffarans, and A. P. Sheldon, my true and lawful attorneys in fact, for me and in my name to deliver to Alexander Cross, of San Francisco, in California, my assignment to said Cross of all my right, title, and interest in and to an iron warehouse in San Francisco, together with all rents accrued or to accrue on the same, as are more particularly set forth in my said assignment, bearing date of the 10th day of July, 1851, and attached to a certified copy of my contract of 11th November, 1850, with T. Butler King, collector of San Francisco, for the rent of said houses, &c.

"And my said attorneys are also hereby fully authorized and empowered to receipt for and receive from said Cross all money, bonds, or notes stipulated to be received by me as the consideration for said assignment, and to take from said Cross a release of all responsibility on my part, arising out of any and all contracts heretofore made between us in relation to the building or renting of said house.

"And my said attorneys are also hereby fully authorized and empowered, if any objection is made to the form of my said assignment or its mode of authentication, to alter or amend the same at their discretion, or in fact to make any new or other assignment for me.

"And my said attorneys are also hereby fully empowered and authorized to substitute another attorney in their places, with the same full powers in the premises as are hereby conferred on them, hereby binding and obliging myself to ratify and confirm whatever my said attorneys or their substitute may do in the premises, and making their acts as binding on me as if done by myself.

"In testimony whereof I have hereunto set my hand and seal this 10th day of July, 1851.

"DAN'L SAFFARANS. [SEAL.]

"Signed, sealed, and delivered in presence of the undersigned witnesses:

"H. M. LUSHER.

"C. G. LEONARD.

"JAMES ROSE, JR."

On the 25th day of July, A. D. 1851, R. H. Crittenden gave to George W. Guthrie a power of attorney, of which the following is a copy :

“NEW YORK, *July* 25, 1851.

“Know all men by these presents, that I, R. H. Crittenden, of Frankfort, Kentucky, do hereby nominate, constitute, and appoint George W. Guthrie, of the city of San Francisco, California, my true and lawful attorney in fact to act for me under the foregoing joint power of attorney from Daniel Saffarans to Isaac Saffarans, A. P. Sheldon, and myself, with power of substitution ; hereby authorizing the said Guthrie to exercise all the rights and powers which I myself could do under the said power of attorney from Daniel Saffarans ; binding myself to approve whatever the said Guthrie may do in the premises, making his acts as binding as if done by me.

“Witness my hand and seal

“R. H. CRITTENDEN. [L. s.]

“Signed and sealed in presence of—

“JAMES ELDREDGE.

“GEORGE N. SANDERS.”

The last two powers of attorney were written on the same sheet of paper.

On the 19th day of November, A. D. 1851, A. P. Sheldon gave Isaac Saffarans (B) a power of attorney, of which the following is a copy :

“Know all men by these presents, that I, A. P. Sheldon, of Sumner county, in the State of Tennessee, recently of San Francisco, in the State of California, have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint Isaac Saffarans, (B,) of San Francisco, aforesaid, my true and lawful attorney in fact, for me and in my name and stead to endorse my name and approval upon a certain deed of conveyance, executed by Daniel Saffarans, of Shelby county, Tennessee, to Alexander Cross, of England, now in San Francisco, about the month of June, 1851, whereby the said Daniel Saffarans conveyed to the said Cross an iron fire-proof warehouse of four stories, erected by said Cross in the city of San Francisco aforesaid, which said warehouse is now occupied by the government of the United States, under a lease from the said Daniel Saffarans, for custom-house purposes, it being now impracticable for me, in the absence of papers relating to the same, to describe the property conveyed by said deed with more minuteness and precision, which said deed was sent to California by the said Daniel Saffarans as an *escrow* to take effect as a deed upon condition that the same should be approved and endorsed by Robert Crittenden, the said Isaac Saffarans, (B,) and myself, and the same has been approved and endorsed by the said Robert Crittenden, by George Guthrie, his attorney in fact, and by the said Isaac Saffarans, (B,) and would have been approved and endorsed by myself, in person, had I not left California before the said deed arrived there.

“And I hereby engage to ratify and confirm the approval and en-

dorsement of the said deed by my said attorney in fact, as fully and amply as though the same were done by myself in proper person.

"In testimony whereof I have hereunto set my hand and affixed my seal, this 19th day of November, in the year of our Lord one thousand eight hundred and fifty-one

"A. P. SHELDON. [L. s.]"

On the 12th day of April, A. D. 1851, Daniel Saffarans gave Isaac Saffarans, (B,) power of attorney, of which the following is a copy :

"Know all men by these presents, that I, Daniel Saffarans, of the county of Shelby, and State of Tennessee, have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint my son, Isaac Saffarans, (B,) now of San Francisco, in the State of California, my true and lawful attorney in fact, for me and in my name to demand, collect, and receive all moneys due to me, or hereafter to become due to me in the State of California, and particularly to demand and receive from the collector of the customs at the port of San Francisco, or any other proper officer whose duty it may be to pay the same, all moneys now due or hereafter to become due to me from the government of the United States of America, for the rent of an iron warehouse in San Francisco, under a contract made by me with the said government, and full receipts and acquittances for all such moneys to execute in my name.

"And I do also hereby further authorize and empower my said attorney in fact, for me and in my name to purchase from Alexander Cross all his interest in an iron warehouse in San Francisco, erected by said Cross under a contract with me; the extent of said interest being twenty-seven and two-thirds one hundredths ($\frac{27\frac{2}{3}}{100}$) of the whole, and to pay to said Cross whatever may be due to him from me on account of advances made by him for me towards the purchase of the lot on which the said warehouse is erected, and the erection of said warehouse; and if it shall be necessary to raise money for the purpose of making the said purchase and payment, I hereby authorize my said attorney in fact to raise the same by a loan, to any amount not exceeding ninety thousand dollars, (\$90,000,) and to secure the repayment thereof by an assignment of the rents of the said warehouse hereafter to become due from the government of the United States, in such manner as may be agreed on by the party or parties loaning the money and my said attorney in fact, to whose discretion I confide all the details of the necessary arrangements respecting the security to be given for said loan; and I hereby engage to ratify and confirm all the acts and things that may be done by my said attorney in fact in the premises pursuant to this power of attorney, in as full and ample a manner as though the same were done by myself in proper person.

"Given under my hand and seal this twelfth day of April, in the year of our Lord one thousand eight hundred and fifty-one.

"DANIEL SAFFARANS. [L. s.]"

On the 15th day of September, A. D. 1851, Isaac Saffarans, (B,) professing to act as attorney for Daniel Saffarans, endorsed upon the above mentioned copy of the contract of the 11th day of November,

A. D. 1850, between the United States and Daniel Saffarans, as follows :

“SAN FRANCISCO, *September* 15, 1851.

“SIR : Having assigned and transferred to Alexander Cross within contract, you will please pay all back and future rents arising under same to said Alexander Cross.

“I am, very respectfully, sir, your obedient servant,

“DANIEL SAFFARANS,

“Per attorney, ISAAC SAFFARANS, (B.)

“Hon. T. BUTLER KING,

“*Collector of the port of San Francisco.*”

T. Butler King, as collector of the port of San Francisco, made, upon the last mentioned copy of the contract of the 11th day of November, A. D. 1850, the following endorsement :

“I, as collector of the port of San Francisco, do hereby accept the iron warehouse erected by Alexander Cross upon a part of the water lot, No. 49, on Battery street, now in the occupation of the United States government as a bonded warehouse, as the warehouse contracted to be built by Daniel Saffarans, as provided in a contract of which the within is a copy. And I do hereby officially recognize said Cross as landlord, it being understood that I am to incur no individual responsibility in the premises. This acceptance to date as if done 14th January, 1851.

“T. BUTLER KING,

“*Collector of the Port of San Francisco.*”

The Secretary of the Treasury, in a letter dated April 12, A. D. 1853, addressed to R. P. Hammond, esq., collector of San Francisco, said : “The agreement between Daniel Saffarans and James Collier, under date of the 28th of April, 1849, appears to have been made in Hamilton county, Ohio, for the building by Saffarans of a fire-proof building at San Francisco, on a site to be selected by said Collier, and the lease of it for fifteen years, at a rent of \$, which contract was approved by Wm. M. Meredith, Secretary of the Treasury, on condition that the rate of rent to be paid for the building should be agreed upon by the collector and approved by the Secretary, and the rent stipulated for to depend upon and to be paid out of appropriations expressly made by Congress for the purpose and from no other source, or according to existing laws at the time of payment.

“The supplemental agreement to give effect to the proceeding, under date of the 11th November, 1850, between T. Butler King, and Daniel Saffarans, recites the building was completed, that the collector, King, had contracted to rent said warehouse for fifteen years, at \$2,000 *per* month ; that the contract was sent to Washington, and Thomas Corwin disapproved the rent at \$2,000 *per* month. On the 11th November, 1850, it appears the rent was fixed at \$1,800 [1,500?] *per* month, for ten years from taking possession, between the owners and T. Butler King.

“T. Butler King was appointed collector on the 14th October, 1850,

and the law requires he should, before entering on his duties, take the oath of office in his collection district. He was in Washington at the time of his appointment, and had not on the 11th November, 1850, given bond or taken the oath of office, and was consequently not collector. He was in the same condition when the supposed agreement for a rent of \$2,000 *per month* was made.

“The law requires the sworn collector to make these contracts, and he must be sworn in the district, and he ought to see the houses he rents, and know the value of the rent by actual personal knowledge. He was not a collector when the rent was fixed at \$1,500 per month, and was not in the district, and had not the knowledge, and could not know the value of the property or its adaptation to the public use. This pretended lease is not binding on the United States.

* * * * *

“The collector will abandon the premises mentioned in the agreement with * * * * and that with Daniel Saffarans, and notify the lessors respectively that rent will no longer be paid for said buildings, and that said pretended leases are held void.”

T. Butler King took the oath of office as collector of the district of San Francisco on the 31st day of October, A. D. 1850, before Hon. Sam. R. Betts, United States judge for the southern district of New York.

E. C. Seaman, acting comptroller, in a letter to T. Butler King, dated November 1, A. D. 1850, said: “Your official bond having been received and approved, your commission as collector is herewith transmitted. Inasmuch as there is question about the legality of your oath of office endorsed thereon, taken before the judge of the district court for the southern district of New York, you are hereby required, before entering upon the duties of your office, to take another oath of office within the collection district before some judge or magistrate authorized to administer oaths therein, and have the official character and signature of such officer duly certified by the clerk of a court of record of the proper county under his seal of office, in accordance with the form of oath and certificate, and the instructions at the bottom of the blank bond herein enclosed and you will please to transmit the same, so certified, forthwith to this office.”

On the 8th day of January, A. D. 1851, T. Butler King, collector of the district of San Francisco, took the oath of his office within his district before a judge of the 4th district court in the State of California.

The Secretary of the Treasury, in his letter to the collector of San Francisco, dated April 12, A. D. 1853, omitted to notice the joint resolution of February 14, A. D. 1850. This resolution expressly provides, “That the Secretary of the Treasury shall be authorized to dispose of the bonded warehouses now leased by government, on or before the first of January next, on the best practicable terms for the government; but he may retain such parts of said houses, or *lease such other houses*, at his discretion, as may be necessary for the storage of unclaimed goods, or goods which for any other reason are required by law to be stored by the government.”—(9 Stat. at Lar., pp. 560-1.

See the opinion of this court in the case of Theodore Adams *vs.* The United States.)

In pursuance of the instructions above mentioned, the collector of San Francisco gave notice to the petitioner in writing, as follows:

“CUSTOM-HOUSE, SAN FRANCISCO,
“*Collector's Office, August 4, 1853.*

“SIR: I have the honor to inform you, that in obedience to instructions which I have received from the Secretary of the Treasury, under date of April 12, 1853, that ‘the pretended lease’ under which the warehouse belonging to you on Battery street has been occupied for the storage of goods by the United States, ‘is not binding on the United States,’ and that I am to abandon that building; I shall on the 13th instant give up the possession of the said store, and not pay any rent for it after that date.

“Respectfully, your obedient servant,

“RICHARD P. HAMMOND,
“*Collector.*

“ALEXANDER CROSS, Esq.”

The petitioner replied to this notice as follows:

“SAN FRANCISCO, *August 13, 1853.*

“SIR: I have to acknowledge the receipt of a letter from you, under date August 4th, apprising me that in obedience to instructions from the Secretary of the Treasury, you will on the 13th instant give up the possession of my warehouse on Battery street, and not pay any rent for it after that date.

“I do not recognize a right in the Secretary of the Treasury to rescind my contract with the government in reference to said warehouse, and I shall therefore claim payment of rent pursuant to said contract until the expiration of the term for which the building was leased.

“Respectfully, your obedient servant,

“ALEX. CROSS.

“RICHARD P. HAMMOND, Esq.,
“*Collector of Customs.*”

On the 15th day of August, A. D. 1853, the collector gave notice to the Secretary of the Treasury as follows:

“CUSTOM-HOUSE, SAN FRANCISCO,
“*Collector's Office, August 15, 1853.*

“SIR: I have the honor to inform you that I have, in obedience to your instructions dated April 12th, 1853, abandoned the store leased from Daniel Saffarans, and transmit herewith a copy of the notice served upon Mr. Cross the assignee of Saffarans. The bonded merchandise which was stored in that warehouse has been transferred to a store of brick, fire-proof, which has been bonded by Messrs. Hall & Co., on the corner of Green and Battery streets. The unclaimed

merchandise has been removed to Eldridge's stores, corner of Union street. That which has been in store over nine months will be sold at auction on the 22d instant.

"I have the honor to be, very respectfully, your obedient servant,
"RICHARD P. HAMMOND,
"Collector.

"Hon. JAMES GUTHRIE,
"Secretary of the Treasury, Washington."

From the 13th day of August till the 1st day of September, A. D. 1853, the warehouse in question was unoccupied. From the 1st day of September, A. D. 1853, till the 1st day of September, A. D. 1854, it was occupied by Francisco Salvador Alvarez, to whom it was leased at the rent of seven hundred and fifty dollars a month. From the 1st day of September, A. D. 1854, to the 10th day of August, A. D. 1855, Cross & Co. received goods therein on storage, at rates specified in an account appended to the deposition of Henry Lund. From the 10th day of August, A. D. 1855, till the early part of the year 1857, J. J. Southgate & Co. occupied about three-fourths of the first floor, at a rent of *one hundred dollars* a month; and Cross & Co. received goods in the rest of the building on storage, at rates specified in the account already mentioned, appended to the deposition of Henry Lund.

The rent received from F. S. Alvarez amounted to the sum of *nine thousand dollars*. The rent received from J. J. Southgate & Co. to the 10th of November, A. D. 1856, amounted to the sum of *fifteen hundred dollars*. Cross & Co. received for storage up to and inclusive of the 14th day of November, A. D. 1856, the sum of *six thousand one hundred and twenty-one dollars and seventeen cents*; and incurred expenses in receiving and delivering to the amount of *nine hundred and forty-five dollars*, leaving the "amount of net storage" the sum of *five thousand one hundred and seventy-six dollars*.

The petitioner now claims as follows:

For rent of the above mentioned iron warehouse, from the 13th day of August, A. D. 1853, to the 14th day of November, A. D. 1856, 39 months, at \$1,500 a month.....	\$58,500 00
He offers to give the United States credit as follows:	
For the money received from F. S. Alvarez.....	\$9,000 00
For the money received from J. J. Southgate & Co.....	1,500 00
For the money received for storage.....	5,176 00
	15,676 17
After deducting therefrom a commission of five per cent.	783 80
Net amount to be credited.....	14,892 37
Balance now claimed.....	43,607 63
	58,500 00

The petitioner claims the above balance of *forty-three thousand six hundred and seven dollars and sixty-three cents*, with interest thereon at the rate of six per centum per annum.

I am of the opinion that the lease from Daniel Saffarans to the United States is valid as a lease to them of the warehouse for ten years, at the rent of *fifteen hundred dollars* a month, payable monthly; and that the United States are liable and bound to pay, to whomsoever may be legally entitled thereto, the rent from the 13th day of August, A. D. 1853, till the 13th day of January, A. D. 1861, when the term will expire, subject to a deduction for such profits as have been or may be reasonably realized therefrom.

I am also of the opinion that it was not incumbent upon the petitioner to take possession of the warehouse when it was abandoned by the United States, or to take any steps thereafter to make it in any way available during the term for which it was leased. But as he has done so, he is, under the circumstances, responsible to the United States only for such profits as he may have reasonably realized therefrom. I think, too, that the claim of a commission of five per centum upon the amount received for rents and storage is reasonable and just.

But since the first hearing of this case a doubt has arisen in regard to the sufficiency of the proof of the title of the petitioner as assignee of Daniel Saffarans; and that question has again been argued before us; the petitioner, by his counsel, stating that he can offer no further evidence. Upon consideration of the whole evidence on this point, I am of the opinion that the petitioner's title is not sufficiently shown.

Before the former hearing of this case, the solicitor for the United States and the counsel for the petitioner filed in this case the following paper:

“ IN THE COURT OF CLAIMS.

“ ALEXANDER CROSS *vs.* THE UNITED STATES.

“ It is agreed that the paper marked thus, (Paper No. 1,) and put on file in this case, is a true copy of the original article of agreement between Daniel Saffarans, of the first part, and the United States of America, by James Collier, collector of the district of San Francisco, California, of the second part, and of the approval of said agreement by W. M. Meredith, Secretary of the Treasury.

“ That the paper marked thus, (Paper No. 2,) and also put on file in this case, contains true copies of the originals of the following enumerated papers, to wit:

“ 1st. A copy of the article of agreement of the 11th of November, 1850, between T. Butler King, collector of the port of San Francisco, for and on behalf of the United States government, of the first part, and Daniel Saffarans, of the second part.

“ 2d. A copy of the approval of the last named article of agreement by Thomas Corwin, Secretary of the Treasury, endorsed on said original article of agreement.

“ 3d. A copy of the assignment of said last named article of agree-

ment by said Daniel Saffarans to Alexander Cross, the plaintiff in this case.

“ 4th. A copy of the approval of said assignment by R. W. Crittenden, A. P. Sheldon, and Isaac Saffarans, (B,) as the attorneys of said Daniel Saffarans, endorsed on said agreement.

“ 5th. A copy of a letter of said Daniel Saffarans by his attorney, Isaac Saffarans, (B,) of the date of the 15th of September, 1851, addressed to T. Butler King, collector of the port of San Francisco, notifying him that said article of agreement of the 10th of November, 1850, had been assigned to said Alexander Cross, and requesting him to pay all back and future rents to said Cross.

“ 6th. A copy of the acceptance by said T. Butler King, as collector of the port of San Francisco, of the iron warehouse named in said article of the 11th of November, A. D. 1850, and of his official recognition of said Alexander Cross as the landlord to whom the rents of said warehouse were to be paid.

“ It is agreed that the paper marked thus, (Paper No. 3,) and also put on file in this case, is the original letter of Richard P. Hammond, collector of San Francisco, to Alexander Cross, notifying him that, in pursuance to instructions from the Secretary of the Treasury, he should, on the 13th of August, 1853, abandon said warehouse, and stop the payment of rent from that date.

“ Signed—

“ M. BLAIR,
“ *Solicitor United States.*
“ S. F. VINTON,
“ *For Alexander Cross.*

“ JUNE 4, 1857.”

On the paper containing the power of attorney from Daniel Saffarans to Robert H. Crittenden, Isaac Saffarans, and A. P. Sheldon, and the power of attorney from R. H. Crittenden to George W. Guthrie, the solicitor made the following endorsement: “ I waive all objection to the admissibility of this paper in evidence.” Signed “ M. Blair, solicitor,” and dated “ Washington, June 4, 1857.”

On the power of attorney from A. P. Sheldon to Isaac Saffarans, (B,) the solicitor made the following endorsement: “ I waive all objection to the admissibility of this paper in evidence.” Signed “ M. Blair, solicitor,” and dated “ Washington, June 4, 1857.”

On the power of attorney from Daniel Saffarans to Isaac Saffarans, (B,) the solicitor made the following endorsement: “ I waive objection to the admissibility of this paper in evidence.” Signed “ M. Blair, solicitor,” and dated “ June 4, 1857.”

All the papers above mentioned were read by the petitioner's counsel in evidence, without any objection being made by the solicitor for the United States.

I understand the above mentioned agreement between the solicitor of the United States and the counsel for the petitioner, and the several endorsements above mentioned made by the solicitor of the United States, as *solemn admissions*, the object of which was to dispense with the necessity of producing the originals, where copies only are filed,

and of proving the due execution of any of the originals. I am therefore of the opinion that we are bound to treat the above copies as originals, and to consider the execution of all the originals as *solemnly admitted*.

In the above agreement of counsel, as it was originally drawn, at the conclusion of the sixth enumeration, after the word "paid," there was added as follows: "and it is agreed that no further proof will be required of said assignment of said article of agreement of said 11th of November, 1850, and of the recognition of said Cross as the landlord to whom rent was to be paid by the United States." This was stricken out by drawing the pen across it; the object plainly being to avoid an admission of a mere conclusion of law; for whether the papers above mentioned, as understood by me, do or do not prove the assignment from Saffarans to Cross is merely a conclusion of law.

But it is plain, I think, that those papers do not show a valid assignment from Daniel Saffarans to the petitioner. Isaac Saffarans alone, in proper person, endorsed his approval on the assignment. George W. Guthrie, professing to act as the attorney in fact of Robert H. Crittenden, undertook to endorse the approval of the latter thereon; but he was not duly authorized to do so. The power of attorney under which he acted was invalid. It purported to confer on him the powers conferred on R. H. Crittenden by the power of attorney from Daniel Saffarans to Robert H. Crittenden, Isaac Saffarans, and A. P. Sheldon. But the latter power of attorney conferred on those three persons a joint and not a several power; and the power of substitution therein contained was a joint and not a several power. The three jointly had the power to appoint a substitute, but no one of them had such power separately. The power of attorney, therefore, from Robert H. Crittenden to George W. Guthrie was invalid; it gave no power to Guthrie to act in the premises; hence, there was no approval by Crittenden, Isaac Saffarans, and A. P. Sheldon of the assignment from Daniel Saffarans to the petitioner; and according to the express stipulation between the parties that assignment is not to be valid until such approval is endorsed thereon.

I am therefore of the opinion that the petitioner has not shown a title to relief.

IN THE COURT OF CLAIMS.

ALEXANDER CROSS *vs.* THE UNITED STATES.

LORING, Judge.

I concur in the opinion that has just been read in all respects, except that I think the petitioner's legal title is defective in this—

He claims under an assignment of the lease, and has put in evidence the deed of assignment itself. It requires expressly that the approval of R. H. Crittenden, Isaac Saffarans, and A. P. Sheldon, should be endorsed upon it, as a condition precedent to its validity as a deed.

The approval by Crittenden is not shown. An approval is signed by his attorney, G. W. Guthrie; but the power of attorney from

Crittenden, under which Guthrie acted, only purported to substitute him for Crittenden in another power of attorney, made by Daniel Saffarans to R. H. Crittenden, Isaac Saffarans, and A. P. Sheldon; and this power of attorney does not provide for, include, or refer to the approval of the assignment, but relates exclusively to other and different matters, and a substitution of Guthrie for Crittenden, under this power, could authorize Guthrie to act only in those matters to which the power of attorney referred.

The approval by Crittenden was provided for in a separate writing, and from its nature, as a matter of personal truth and confidence, he could not delegate it to an attorney, and there is no instrument of his in the case that even purports to do so or shows any such intent. The approval, therefore, signed by Guthrie, as Crittenden's attorney, is unauthorized and a mere nullity, of no legal effect for any purpose.

Then a legal approval by Sheldon cannot be inferred from the delivery of the assignment by Guthrie as Sheldon's attorney, because Sheldon's approval is required to be endorsed, and therefore *express*; and an approval merely inferred from anything, and not endorsed, would be legally insufficient. The requirement of the endorsement is the same as that of the approval; one is as material as the other, and both are absolutely essential to the validity of the deed.

As the petitioner has put in evidence the deed of assignment itself, the positive proof that it was not legally executed excludes all inference to the contrary from the facts of the case, and consequently his title to the relief he prays for is not made out.

House documents

Bd.: [121,g.] 1858/59 (1859) = Congress 35, Sess. 2

Washington, DC 1859

Am.b. 3040-121,g

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